TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1931

No. 31

MAGNO SANTOVINCENZO, CONSUL OF THE KINGDOM OF ITALY AT NEW YORK, APPELLANT,

vs.

JAMES F. EGAN, PUBLIC ADMINISTRATOR, ETC., AND JOHN J. BENNETT, JR., ATTORNEY GENERAL OF THE STATE OF NEW YORK

APPEAL FROM THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK, STATE OF NEW YORK

FILED MARCH 10, 1931

(35,709)

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[fol. a]

NEW YORK SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Judicial Settlement of the Account of Proceedings of the PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, Administrator of the Goods, Chattels, and Credits of Antonio Comincio, Deceased

Case on Appeal

Ralph Atkins, Attorney for Magno Santovincenzo, Consul of the Kingdom of Italy at New York, Appellant, 95 Liberty Street, New York, N. Y.

Hamilton Ward, Attorney General of the State of New York, The Capitol, Albany, N. Y.

N. Joseph Slicklen, Attorney for Public Administrator of New York County, 299 Broadway, New York, N. Y.

[fol. 1] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION, FIRST DEPARTMENT

In the Matter of the Judicial Settlement of the Account of Proceedings of the PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, Administrator of the Goods, Chattels, and Credits of Antonio Comincio, Deceased

STATEMENT UNDER RULE 234

This is an accounting proceeding instituted by the Public Administrator of New York County, as Administrator of the estate of Antonio Comincio, deceased.

The petition and account were filed in the Surrogates' Court of New York County on the 20th day of February, 1929.

The answer of the Acting Consul General of Italy to said petition was filed on the 9th day of April, 1929.

N. Joseph Slicklen, Esq., appeared as attorney for James F. Egan, Public Administrator of New York County, and Ralph Atkins, Esq., as attorney for Magno Santovincenzo,

Acting Consul General of Italy at New York. Hon. Hamil-
[fol. 2] ton Ward, Attorney General of the State of New York, also appeared in the proceeding.

The names of the original parties are as set forth herein. There has been no change of parties or attorneys since the institution of this proceeding.

IN SURROGATES' COURT OF NEW YORK COUNTY.

In the Matter of the Judicial Settlement of the Account of Proceedings of the PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, Administrator of the Goods, Chattels, and Credits of Antonio Comincio, Deceased

NOTICE OF APPEAL

SIRS: Please take notice that Magno Santovincenzo, Consul of the Kingdom of Italy at New York, hereby appeals on the law and on the facts to the Appellate Division of the Supreme Court, for the First Judicial Department, from the decree made and entered in the above-entitled matter by the Honorable James A. Foley, Surrogate, on the 3rd day of July, 1929, settling the account of the Public Administrator of the County of New York, as Administrator, [fol. 3] etc., of the estate of the above-named deceased and making distribution, and he hereby appeals from each and every part of said decree as well as upon the facts, and will ask the Court to exercise its powers under Section 309 of the Surrogates' Court Act.

Dated N. Y., August 1, 1929.

Yours, &c., Ralph Atkins, Attorney for Magno Santovincenzo, Consul of the Kingdom of Italy at New York, Appellant, No. 95 Liberty Street, Borough of Manhattan, City of New York.

To Hon. Hamilton Ward, Atty. General of the State of New York, 51 Chambers Street, New York City; Hon. Martin G. McCue, Clerk of the Surrogates' Court, County of New York; N. Joseph Slicklen, Esq., Attorney for Public Administrator of New York County.

[fol. 4] In Surrogates' Court of New York County

A 928—1925

In the Matter of the Judicial Settlement of the Account of Proceedings of the Public Administrator of the County of New York, Administrator of the Goods, Chattels, and Credits of Antonio Comincio, Deceased

Decree on Accounting

Decree Appealed From—July 3, 1929

The Public Administrator of the County of New York as Administrator of the goods, chattels and credits of Antonio Comincio deceased, who at the time of his death was a resident of 355 East 76th Street, N. Y. City, having heretofore filed a petition, verified the 20th day of February, 1929, in which application was made to the Surrogate of the County of New York, for a judicial settlement of his account of such administrator and a citation having been thereupon issued, pursuant to statute, directed to all persons interested in the estate or fund of the said deceased, citing them to show cause before the said Surrogate, at his office in the County of New York, on the 9th day of April, [fol. 5] 1929, at ten-thirty o'clock in the forenoon of that day, why the account of said administrator should not be judicially settled, and the said citation having been returned with proof of the due service thereof on Attorney General of the State of New York, Consul General of Italy, and the said Administrator having appeared on the return day of said citation by his attorney, N. Joseph Slicklen, Attorney General of the State of New York, and Ralph Atkins also appeared herein, and the said Administrator having rendered his account under oath, before the said Surrogate; and the said account having been filed and objection thereto having been made or filed by the Consul General of Italy, and the same having come on to be heard before the Surrogate on the 6th day of June, 1929, and the Surrogate having found that the domicile of the decedent was in New York City, and said objections having been overruled, and the said matter having been duly adjourned to this day, the said Surrogate, after having examined the said

account, now here finds the state and condition of the said account to be as stated and set forth in the following summary statement thereof, to wit:

A summary statement of the account of the Public Administrator of the County of New York and administrator of the goods, chattels, and credits of Antonio Comincio, deceased, made by the Surrogate as judicially settled. The said Administrator is chargeable as follows:

With amount as per Schedule A	$1,392.83
With amount as per Schedule C	343.82
Leaving a balance in his hands of	$1,042.98

[fol. 6] And it appearing that the said Administrator has fully accounted for all the moneys and property of the estate or fund of said deceased, which have come into his hands as such Administrator and his account having been adjusted by the said Surrogate and a summary statement of the same having been made as above and herewith recorded, it is hereby ordered, adjudged and decreed, that the said account be and the same is hereby judicially settled.

It is further ordered, adjudged and decreed that out of the balance so found remaining in the hands of said Administrator, he do pay into the City Treasury of The City of New York, the sum of Sixty-nine and 64/100 ($69.64) Dollars for commissions on the estate of said deceased, the same being the commissions to which The City of New York is entitled under Section Third of Chapter 230 of the Laws of 1898, and that he do also pay into the City Treasury pursuant to said Chapter 230 of the Laws of 1898 the sum of Ten ($10.00) Dollars, the costs and disbursements of said Administrator taxed herein by the Surrogate.

And it is further ordered, adjudged and decreed that the Administrator retain the sum of Fifty-four and 70/100 ($54.70) Dollars as his disbursements as taxed herein.

And it appearing that the decedent was domiciled in New York City after a hearing had thereon, and that the next of kin are unknown, so far as the Administrator has been able to ascertain after due diligence and the testimony of the witness produced by the Consul General of Italy at said hearing, it is

[fol. 7] Further ordered, adjudged, and decreed that the Administrator pay the balance of the estate remaining in his hands, to wit, the sum of Nine Hundred Fourteen and 64/100 ($914.64) Dollars, into the City Treasury of the City of New York for the use and benefit of the unknown next of kin of the above decedent, together with the accumulated interest if any.

James A. Foley, Surrogate.

IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

NOTICE OF APPEARANCE BY ATTORNEY GENERAL

The Attorney General of the State of New York, one of the persons cited herein, hereby appears and admits due, timely and personal service of a copy of the citation [fol. 8] herein returnable April 9, 1929, and demands service of all papers herein on him at his office in the City of Albany, New York.

Dated Albany, N. Y., March 1, 1929.

Hamilton Ward, Attorney General, by Victor R. Kaufman,, Deputy Assistant Attorney General. Office & P. O. address: Capitol, Albany, N. Y., New York City Bureau, 49 Chambers Street, New York City.

To James P. Blue, Esq., Attorney for Public Administrator, Hall of Records, Room 308, New York City.

STATE OF NEW YORK,
City and County of New York, ss:

On this 1st day of March, 1929, before me personally came Victor R. Kaufman, to me known to be a duly constituted Deputy Assistant Attorney General and the person who executed the foregoing instrument and he duly acknowledged to me that he as such Deputy Assistant Attorney General had executed the same in the name and on behalf of the Attorney General for the uses and purposes therein mentioned.

Joseph Ricciotti, Commissioner of Deeds, City of New York.

[fol. 9] IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

ANSWER OF CONSUL GENERAL OF ITALY

Magno Santovincenzo, Acting Consul General of Italy at New York, answering the petition herein, alleges:

First. That respondent is the duly appointed Acting Consul General of Italy at New York; was duly accredited by the Government of the United States accordingly and is now engaged in the discharge of the duties of said office.

Second. Upon information and belief that the above-named deceased was at the time of his death a subject of the King of Italy and left him surviving no natural heirs and next of kin.

Third. That Section 721, Title 2, Chapter 1, Book Third of the Civil Code of the Kingdom of Italy, in effect June 25, 1865, provides as follows:

[fol. 10] "The law devolves the succession to legitimate descendants, to ascendants, to collaterals, to natural children and to the spouse in the order and in accordance with the rules hereinafter established and in their absence to the patrimony of the State."

Fourth. That the aforesaid statute is still in full force and effect.

Fifth. Upon information and belief that Article VI of the Treaty of Friendship with Persia, proclaimed August 18, 1857, provides:

"In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citizen so that he may dispose of them in accordance with the laws of his country."

Sixth. That the foregoing provision of the treaty between the United States and Persia has been incorporated

in the Consular Convention between the United States and the Kingdom of Italy by reason of the provisions of Article XVII thereof, otherwise known as the "Most Favored Nation Clause," reading as follows:

"The respective Consuls General, consuls, vice consuls and consular agents as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries all the rights, prerogatives, immunities and privileges [fol. 11] which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

Wherefore respondent asks that the decree herein provide for the payment of the balance of the estate of the above-named deceased remaining for distribution to the Kingdom of Italy.

Ralph Atkins, Attorney for Acting Consul General of Italy at New York, No. 95 Liberty Street, Borough of Manhattan, City of New York.

[Verified by Magno Santovincenzo.]

IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

PETITION

To the Surrogates' Court of the County of New York:

The petition of the Public Administrator of the County [fol. 12] of New York having his office in the Hall of Records, Borough of Manhattan, City and County of New York, respectfully states:

That letters of administration upon the goods, chattels and credits of Antonio Comincio, deceased, who at the time of his death resided at 365 East 76th Street, New York City, were granted to your petitioner by the Surrogates' Court of New York County, New York, on the 10th day of March, 1925.

That more than six months has elapsed since the issuance of said letters of administration and that the time for

presentation of claims as fixed by a notice duly published has expired.

That the names and post-office addresses of all creditors or persons claiming to be creditors of the decedent (except such as by vouchers filed with the account appear to have been paid), of the sureties on the official bond of your petitioner, of the widow, husband, of the decedent, of all the next of kin of the decedent (except such as by the vouchers and releases duly executed and filed appear to have been paid), and all other necessary and proper parties, are as follows:

Name	Nature of interest	Post office address
Kin Unknown		
Attorney General of State of N. Y.		Albany, N. Y.

The Consul General of Italy has made claim to this estate on behalf of The Kingdom of Italy under the provision of Section 721 of the Italian Civil Code inasmuch as it appears from the documents filed with your petitioner that decedent left no kin surviving.

Your petitioner knows of no source from which he might [fol. 13] obtain information of decedent's next of kin and therefore desires to publish against an unknown widow and next of kin, if any there be, and purposes depositing the balance in his hands into the City Treasury for the benefit of unknown next of kin unless otherwise directed by the Surrogate.

That to the best of your petitioner's knowledge, information and belief there are no other persons than those above mentioned interested in this proceeding, and that all of said above mentioned persons are of full age and all are of sound mind.

That the estate herein amounts to less than five thousand dollars.

That your petitioner is desirous of rendering to said Surrogates' Court an account of his proceeding, and therefore prays that his account be judicially settled and that the persons above mentioned and all necessary and proper persons be cited to show cause why such settlement should not be had and for such other and further relief as the Court may deem just and proper, and that an order be granted accord-

ing to law directing the service of the citation personally without the State or by publication upon the persons hereinbefore stated to be non-residents of the State or otherwise.

Dated February 11, 1929.

James F. Egan, Petitioner.

Duly sworn to by James F. Egan. Jurat omitted in printing.

[fol. 14] In Surrogates' Court of New York County

[Title omitted]

Account of Proceedings

To the Surrogates' Court of the County of New York:

I, The Public Administrator of the County of New York, [fol. 15] having my office in the Hall of Records, Borough of Manhattan, City and County of New York, do render the following account of my proceedings as Administrator of the goods, chattels and credits of the above named decedent: On the 10th day of March, 1925, Letters of Administration were issued to me.

Schedule A, hereto annexed, contains an itemized statement of all moneys, and other property belonging to the estate or fund, which have come into my hands, or which have been received by any person for me or on my behalf as such Administrator.

Schedule B, hereto annexed, contains an itemized statement of all debts not collected or collectible by me together with the reasons why the same have not been collected and are not collectible; and also a statement of the articles of personal property unsold and the reason of the same being unsold, and their appraised value; and also a statement of all property mentioned therein lost by accident, without any willful default or negligence, the cause of its loss and appraised value. No other assets than those herein set forth, have come to my possession or knowledge, and all the increase or decrease in the value of any assets of said deceased is allowed or charged in said Schedules A and B.

Schedule C, hereto annexed, contains an itemized statement of all moneys paid by me for administration, funeral

and other necessary expenses for said estate, together with the reasons and object of such expenditure.

On or about the 24th day of March, in the year 1925, I. caused a notice for claimants to present their claims against [fol. 16] the said estate to me within the period fixed by law, and at a certain place therein specified to be published according to law, pursuant to the statute in such case made and provided.

Schedule D, hereto annexed, contains an itemized statement of all the claims of creditors, presented to and allowed by me or disputed by me or for which judgment or decree has been rendered against me, together with the names of the claimants, the general nature of the claim, its amount, and the time of the rendition of the judgment.

Schedule E, hereto annexed, contains an itemized statement of all moneys, paid by me to the creditors of the deceased, and their names, and the time of such payment.

Schedule F, hereto annexed, contains an itemized statement of all moneys paid to and property delivered to the legatees, husband, widow or next of kin of the deceased.

Schedule G, hereto annexed, contains the names of all persons entitled as husband, widow, legatee, devisee, next of kin or otherwise, to a share of the estate or fund, with their Post Office addresses and degree of relationship to the deceased; a statement showing the value or approximate value of the interest of such person; a statement showing which of the said persons are infants or incompetents, and whether said infants have any father, mother or guardian, and if so, their names and Post Office addresses to the best of my knowledge, information and belief.

Schedule H, hereto annexed, contains a statement of all other facts affecting my administration of said estate or [fol. 17] fund, my rights and those of others interested therein:

I charge myself as follows:

With amount as shown by Schedule A		$1,392.80
I credit myself as follows:		
With amount of Schedule C	$343.82	
		343.82
Leaving a balance of		$1,048.98

to be distributed to those entitled thereto, subject to the deductions of the amount of my commissions, and the expenses of this accounting.

The said Schedules, which are severally signed by me, are part of this account.

SCHEDULE A

Amount of Inventory filed, Bank of Europe	$1,392.83

James F. Egan, Public Administrator, Administrator of the Goods, &c., of Antonio Comincio, Deceased.

SCHEDULE B

[None.]

James F. Egan, Public Administrator, Administrator of the Goods, &c., of Antonio Comincio, Deceased.

[fol. 18] SCHEDULE C

I have paid the following claims:

Funeral Bill	$226.00
Surrogate's Certificates	.50
Labor	5.00
Advertising for Letters of Administration	12.00
Advertising for Creditors	4.43
Postage	1.00
Serving Citations	1.50
Transfer Tax Proceedings	15.00
Certified Copy of Decree	1.00
Filing Petition for Letters	1.85
Filing Account, etc.	4.00
Transfer Tax and Penalty	71.54
	$343.82

James F. Egan, Public Administrator, Administrator of the Goods, &c., of Antonio Comincio, Deceased.

SCHEDULE D

I have paid the following claims against the estate of the decedent which were duly filed with me, namely: [None.]

The following claims against the estate of the decedent were filed with me and duly rejected pursuant to the statute. The same will be ignored by me in making distri-

bution of the estate, unless otherwise ordered by the Surrogate. Notice thereof is given to said claimants, namely: [None.]

[fol. 19] The following claims against the estate of the decedent have been presented to and allowed by me and remain unpaid, namely: [None.]

I desire the Surrogate to direct the payment of the above claims, unless in the meantime, and before the entry of my decree, I am led to doubt their justice and validity and reject the same.

James F. Egan, Public Administrator, Administrator of the Goods, etc., of Antonio Comincio, Deceased.

SCHEDULE E

[None.]

SCHEDULE F.

[None.]

SCHEDULE G

Relationship	Name & address	Approximate value of interest
Kin unknown		$1,000.00

James F. Egan, Public Administrator, Administrator of the Goods, etc., of Antonio Comincio, Deceased.

[fol. 20] IN SURROGATES' COURT OF NEW YORK COUNTY

[Title omitted]

AFFIDAVIT TO ACCOUNT

STATE AND COUNTY OF NEW YORK, ss:

I, The Public Administrator of the County of New York, as Administrator of the goods, chattels and credits of the above named decedent, being duly sworn, say: That the charges made in the foregoing account of proceedings and schedules annexed, for moneys paid by me to creditors, legatees, and next of kin, and for necessary expenses, are correct; that I have been charged therein with all the interest for moneys received by me and embraced in said

account, for which I am legally accountable; that the moneys stated in said account as collected were all that were collectible, according to the best of my knowledge, information and belief; that the allowances in said decrease in value of any assets, and charges therein, for the increase in such value, are correctly made; and that I do not know [fols. 21 & 22] of any error in said account or anything omitted therefrom which may in anywise prejudice the rights of any party interested in said estate or fund; and that said account contains, to the best of my knowledge and belief, a full and true statement of all my receipts and disbursements on account of said estate or fund, and of all money and other property belonging to said estate or fund which have come into my hands, or which have been received by any other person for me or by my order or authority for my use, and that I do not know of any error or omission in the account to the prejudice of any creditor of or person interested in said estate or fund.

James F. Egan.

Sworn to before me this 11th day of February, 1929.
Agnes M. Reid, Notary Public, New York Co. Cl. No. 436.

Citation, in usual form, omitted in printing.

[fol. 23] In Surrogates' Court of New York County

In the Matter of the Judicial Settlement of the Account of Proceedings of the Public Administrator of the County of New York, Administrator of the Goods, Chattels and Credits of Antonio Comincio, Deceased

Case

Before Hon. James A. Foley, Surrogate

New York, June 6, 1929.

Appearances:

Ralph Atkins, Esq., for the Acting Consul General of Italy.

N. Joseph Slicklen, Esq., for the Public Administrator.

The Surrogate: Mr. Victor Kaufman, Deputy Attorney General, has asked me if it would be possible to have this letter marked in evidence.

Mr. Atkins: I presume this states that they have filed the record.

Mr. Slicklen: All I have before me is a letter from some bank containing all the information given by the decedent at the time he opened the account.

[fol. 24] Laideslie Hak, sworn and examined on behalf of the Public Administrator, testified as follows:

By the Surrogate:

Q. Where do you live?
A. 3049 Creston Street.
Q. What is your business?
A. I am in the Bank of Europe and Trust Company.
Q. A clerk?
A. Yes.

Direct examination.

By Mr. Slicklen:

Q. Where is this bank located?
A. 1449 First Avenue.
Q. That is at the corner of 74th Street?
A. Yes.
Q. Your bank turned over to the Public Administrator account No. 44580 a certain sum of money. Can you tell me in whose name that account was? That account was in the name of Antonio Comincio.
Q. At the time he opened that account did he furnish you with certain information which is required by the bank at the time of the opening of the account?
A. I think so. I don't know. I wasn't there.
Q. Can you tell from your records what information he gave at that time?
A. We have all the pedigree from him. He could not write. We have the picture too.
Q. Can you tell us from your record what information he gave to you at that time?
A. He gave his address.

Q. What is the address?
A. 365 East 76th Street.

By the Surrogate:

Q. What is the date of the opening of the account?
A. June 27, 1921.

[fol. 25] By Mr. Slicklen:

Q. What other information did he give you at that time?
A. Occupation, laborer; born in Italy; age, 64 years. No date.

The Surrogate: Opposite the signature is the name written out apparently by the clerk, and then cross mark, his mark. There is also the witness's name, Henry Resler. Opposite the printed word Residence, on the line, is given 365 East 76. Occupation, laborer; place of birth, Italy; date of birth, 64 yrs. Husband's-wife's name blank. There is a line drawn opposite that. Mother's name, Angelina; father's name, Salvatore. On the back appears the picture of apparently a man about 64 years of age.

By the Surrogate:

Q. Did you know this man yourself?
A. No.
Q. There is no other account there, is there?
A. I have three cards there. The book was lost twice.

By Mr. Slicklen:

Q. Did you get information every time you gave him a new book?
A. What information?
Q. Similar to that which you have on the other card?
A. Yes, certainly.
Q. Did you ask him on each occasion for this information?
A. Yes.
Q. When was the account first opened, can you tell that from your record?
A. On the card it says June 27, 1921.
Q. Since that time the book was lost twice?
A. Been lost twice.

Q. He lived with his father?
A. Yes.
Q. What was his father's name?
A. Salvatore Rosanno.
Q. Was that his real father or foster-father?
A. It was his foster-father.
Q. Was Salvatore married?
A. Yes, he was. He had a wife.
Q. Did you know his wife?
A. Yes. We lived very close by.
Q. Do you recall what her name was?
A. I don't remember exactly her first name, but we used to call her Sperandillo.
Q. I mean the first name?
A. I have forgotten.
Q. Do you know when the decedent first came to the United States?
A. He first came here when he was 21. He deserted and then he returned 10 years later to Italy.
Q. Are you referring now to the decedent or yourself?
A. To the decedent.
Q. When did you first come to the United States?
A. 1892 for the first time.
Q. Was the decedent here at that time?
A. Sure. I found him here.
Q. Do you know how long he had been here before you arrived?
A. We were about the same age. I came here two or three years later than he.
Q. Did you keep up your acquaintance with the decedent after his arrival in the United States?
A. Always.
Q. Do you know whether or not he ever married here?
A. No.
[fol. 29] Q. Was he ever married in Italy?
A. No.
Q. Did he ever speak during his lifetime as to any relatives he might have?
A. He wrote letters to nephews and nieces. He had two sisters, one of whom died.
Q. The sisters that you refer to, were they named Rosanno?

A. They used their husband's name. They are not blood sisters.

Q. They are the sons and daughters of Salvatore Rosanno, are they not?

Objected to as leading.

Overruled. Exception.

A. Yes. They are blood children of Salvatore Rosanno.

Q. So that they were no relation to the decedent at all?

A. Antonio Comincio was one of God's own. He was paid by the Government 5 lira a month. He had no relatives.

Q. Will you explain what you mean by one of God's own?

A. An illegitimate child.

Q. Did the decedent ever say to you whether or not he knew his real father and his real mother?

A. Sure, yes. He knew the mother who nursed him, the second mother.

Q. Did he know his real mother?

A. No.

Q. Did he know his real father?

A. No; the second father.

Q. How did he come to live with the Rosanno family?

A. These people, the Rosannos, were very wealthy.

Q. You are referring to the people that brought him up?

A. Yes.

Q. Was the decedent, Antonio Comincio, taken from a foundling hospital by the Rosanno family?

A. I took him from a hospital in 70th Street.

[fol. 30] The Surrogate: We are talking about another hospital now.

The Interpreter: He is beginning a general statement. He has not answered the question as to whether or not he was taken from a hospital.

By the Surrogate:

Q. Your story was that Comincio came here before you did and he went back to Italy. I want to know when he went back to Italy, before 1892 when you arrived, before or after?

A. I was already here when he left for Italy.

Q. When did he come back.

A. In 9 or 10 months.

Q. Within a year after you got here in 1892?

A. I stayed here some six or seven years and then he left for Italy, and he stayed one year and came back.

Q. That would be about 1899?

A. Yes, 1898 or 1899.

Q. Do you remember what ship he went back on?

A. No.

Q. Did he go back on an Italian boat?

A. Yes.

By Mr. Atkins:

Q. What kind of work did he do during his lifetime when he was here?

A. He used to be a vegetable man. He had a horse and wagon and went around with vegetables.

By the Surrogate:

Q. (Showing Accountant's Exhibit No. 1, a photograph.) Who is that?

A. That is him.

Q. So that from 1889 up to the time he died he stayed continuously in this country?

[fol. 31] A. He never returned again to Italy after that He only went to Italy once.

Cross-examination.

By Mr. Slicklen:

Q. When he took that trip to Italy did he go steerage, first-class or second-class?

A. Third class.

Q. He went on a passport?

A. I believe he did, because at that time I don't believe there was the present law in effect.

Q. Do you know what pier he came in on this last trip?

A. I don't know.

Q. Do you know what ship he came on?

A. No, I do not.

Q. Do you know what steamship line he came back on?

A. An Italian ship, but I can't make the name out—Anchor Line.

The Surrogate: That is the second time he is talking about.

The Interpreter: No, that is the first time.

Q. When he came back the last time he came on the Anchor Line?

A. It was an Italian company. There were a number of passenger vessels and all Italian.

Q. What year was that?

A. Approximately 1899.

Q. Do you know what month of the year it was? Was it in the summer or in the winter?

A. He went in the winter and returned in the summer.

By the Surrogate:

Q. Did he ever become a citizen, get his first papers?

A. He did not become a citizen. He did not apply for his third papers.

Q. Are you a citizen?

A. No. I had the first papers.

[fol. 32] By Mr. Slicklen:

Q. How long did Antonio Comincio live at 365 East 76th Street, to your knowledge?

A. More than 24 or 25 years; always there.

Q. Always in that same house?

A. Always in 76th Street.

Q. Did he ever tell you that America was his country now?

A. He said: I have no one in Italy; why should I go to Italy? However, he expressed an intention to go to Italy if I would go with him, but I had my family here and we did not go.

Q. When he wanted to go to Italy it was merely for a visit?

A. He said: I have $2,000; I wanted to retire and return back to Italy if you will come with me.

Q. Only for a visit?

A. Sure, to retire.

By the Surrogate:

Q. You did not want to go back?

A. I have my family here. I did not want to go.

Q. Did you tell him that?
A. Yes.
Q. What did Comincio say?
A. He said: You won't go, neither will I.
Q. When was that?
A. About five years ago.

Testimony closed.

[fol. 33] OPINION

FOLEY, Surr.:

The Public Administrator of the County of New York has filed an account which shows that the net estate of the intestate is approximately $1,000, which is stated to be payable to unknown next of kin. Pursuant to our statutes this amount would be directed in the decree to be paid into the city treasury of the City of New York to await ascertainment of the next of kin. Ultimately the amount would find its way into the treasury of the State of New York. The Consul-General of Italy at New York in his official capacity has made claim to the balance of this estate upon two grounds: (1) That the decedent's domicile at the time of his death was in Italy, and by reason of the laws of that country and because there are no relatives under such laws entitled to take, the fund must be paid to the Kingdom of Italy as an escheat. (2) It is further claimed that even if the decedent was domiciled in New York the consul is entitled to receive the assets of the estate by virtue of the "Most Favored Nation Clause" contained in the treaty between the United States and Italy, and the related effect of a clause contained in the treaty between the United States and Persia. It is claimed that the latter treaty authorizes the Consul of Persia to receive the effects of a citizen or subject of that country dying within the United States where there is no family or partners in business of the deceased. The clause provides "and in case he has no relations or partners, his effects in either country shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country." The [fol. 34] Attorney-General of the State of New York appears and opposes the contention of the Italian Consul-

General. In other words, the questions presented are: (1) Was the decedent at the time of his death domiciled in the State of New York? (2) Regardless of whether he was domiciled here, by reason of the claim that he was originally a national of Italy, did his property pass by succession under the laws of Italy because of the treaty rights? (1) I hold that the decedent's domicile was in the County and State of New York up to the time of his leath. It appears from the testimony that he came here prior to the year 1892, that he returned to Italy for a short visit of a few months about the year 1898. He resided continuously in this state from 1899 to the date of his death in the year 1925. There is some testimony that he at one time spoke about returning to Italy in his later years, but such declarations were vague and indefinite and were never effectuated by any actual return. They were likewise contradicted by contemporaneous and subsequent declarations of the decedent. On three different occasions and within a short time from his death he made declarations to a savings bank that he resided at No. 365 East Seventy-sixth Street, in this county. We have thus a continued residence in this state for a period of upwards of thirty-three years, interrupted only by a brief visit to the intestate's native land. His intention to abandon his domicile of origin and to establish and maintain a domicile in this country is clearly established by the evidence. Both elements of domicile—intent and conduct—have been proven. Citations from the authorities are unnecessary. The leading cases in this state (Dupuy v. Wurtz, 53 N. Y. 556; Matter of Newcomb, 192 N. Y. 238; [fol. 35] Matter of Mesa y Hernandez, 172 A. D. 467; Matter of Chadwick, 109 Misc. 696, at p. 699) support the conclusion that the intestate's domicile was in the State of New York. The distribution of his property must be governed by our Statute of Distribution and by our other laws which deal with the custody of the funds of an estate pending the ascertainment of the next of kin and their ultimate payment into our state treasury. (2) The further contention that because he may have been originally a national of the Kingdom of Italy his personal property passed under the law of Italy and not of New York under the provisions of the treaties referred to must likewise be overruled. It is an elementary rule of the laws of estates that the succession of personal property left by a decedent is governed

exclusively by the law of the actual domicile of the intestate at the time of his death (Story's Conflict of Laws, 8th ed., section 481; Moultrie v. Hunt, 23 N. Y. 394; Depuy v. Wurtz, 53 N. Y. 556; Cross v. United States T. Co., 131 N. Y. 330). Citizenship and nationality on the one hand and domicile on the other involve different principles, but succession to personalty is based upon the finding of domicile only. It is beyond comprehension that the treaty between the United States and Persia ever contemplated any abrogation of this basic rule of law. An examination of the provisions of the Persian Treaty and of the Treaty with Italy compels the interpretation that the consular rights were limited strictly to the receipt of the property of a national of Italy dying here, but domiciled in that country. In the comprehensive opinion of Judge Cardozo in Matter of Adamo (212 N. Y. 214), the rights of the Italian consular officers under the treaty with this country are considered. [fol. 36] In that case it was finally settled in the State of New York that our local statutes governed the appointment of administrators and that the treaty conferred no preference to letters of administration upon the Italian consul. Much of Judge Cardozo's reasoning applies in the present situation. In this proceeding the rights granted by the treaty must be held to be subordinate to the succession statutes of our state. Cases may and do arise where nationals of the Kingdom of Italy, temporarily residing here, but domiciled in that country, may leave personal property which passes under its laws. But in each case the question of domicile when disputed must first be determined. I hold, therefore, that the intestate law of Italy has no application to the present estate. The decree should provide for payment of the balance of the estate into the treasury of the City of New York for the benefit of the unknown next of kin of this decedent, pursuant to the statute of 1898, which regulates the duties of the public administrator in the disposition of the funds held by him. Submit decree on notice settling the account and directing payment accordingly.

[fol. 37] In Surrogates' Court of New York County

Stipulation Settling Case

It is hereby stipulated that the foregoing case contains all the evidence given upon the trial of this proceeding,

and that the same be settled and ordered to be filed and attached to the decree and papers on which it was entered.

Dated October 4, 1929.

Ralph Atkins, Attorney for Appellant. Hamilton Ward, Attorney for State of New York, Respondent. N. Joseph Slicklen, Attorney for Public Administrator, Respondent.

IN SURROGATES' COURT OF NEW YORK COUNTY

ORDER SETTLING AND FILING CASE

On the above stipulation, the foregoing case on appeal, containing all the evidence, is hereby settled and ordered on file.

Dated October 9, 1929.

James A. Foley, Surrogate.

[fol. 38] IN SURROGATES' COURT OF NEW YORK COUNTY

STIPULATION WAIVING CERTIFICATION

Pursuant to the provisions of the Civil Practice Act, it is hereby stipulated that the foregoing consists of true and correct copies of the notice of appeal, decree, papers upon which it was entered, case and exceptions as settled, and of the whole thereof, now on file in the office of the Clerk of the Surrogates' Court, New York County; and certification thereof by the Clerk of said Court is hereby waived.

Dated October 4, 1929.

Ralph Atkins, Attorney for Appellant. Hamilton Ward, Attorney for State of New York, Respondent. N. Joseph Slicklen, Attorney for Public Administrator, Respondent.

IN SURROGATES' COURT OF NEW YORK COUNTY

ORDER FILING RECORD IN APPELLATE DIVISION

Pursuant to Section 616 of the Civil Practice Act and to the stipulation of the parties, it is ordered that the fore-

going printed record be filed in the office of the Clerk of the Appellate Division of the Supreme Court, in the First Judicial Department.

Dated October 9, 1929.

James A. Foley, Surrogate.

[fol. 39] In Supreme Court of New York, Appellate Division

5560

In the Matter of the Judicial Settlement of the Account of Proceedings of the Public Administrator of the Goods, Chattels, and Credits of Antonio Comincio. Deceased.

Order of Affirmance on Appeal from Surrogate—June 23, 1930

An appeal having been taken to this Court by Magno Santovincenzo, Consul of the Kingdom of Italy at New York, from the decree of the Surrogate's Court of the County of New York, entered in the Surrogate's Court on the 3rd day of July, 1929, settling the account of the Public Administrator, and said appeal having been argued by Mr. Ralph Atkins, of counsel for the appellant, and by Mr. Victor R. Kaufmann of counsel for respondent, Attorney General of the State of New York, and by Mr. N. Joseph Slicklen of counsel for respondent, Public Administrator etc.; and the due deliberation having been had thereon,

[fol. 40] It is unanimously ordered and adjudged that the decree so appealed from be and the same is hereby affirmed with costs.

Appellate Division of the Supreme Court, First Judicial Department

Clerk's Office, County of New York

I, George T. Campbell, Clerk of the Appellate Division of the Supreme Court in the First Judicial Department, do hereby certify that the foregoing is a copy of the order

made by said Court, upon the appeal in the above entitled action or proceeding, and entered in my office on the 23d day of June, 1930, and that the original case or papers upon which said appeal was heard are hereunto annexed.

In witness whereof I have hereunto set my hand and affixed the seal of said County, in the County of New York, this 23d day of June, 1930.

George T. Campbell, Clerk. (Seal.)

[fol. 41] In Surrogates' Court of New York County

[Title omitted]

Order on Remittitur—July 17, 1930

Magno Santovincenzo, Consul of the Kingdom of Italy, at New York, having appealed to the Appellate Division of the Supreme Court from the decree of the Surrogates' Court of the County of New York, entered in the Surrogates' Court on the 3rd day of July, 1929, settling the account of the Public Administrator, and the said Appellate Division of the Supreme Court having rendered its decision affirming the said decree with costs, and a certified copy of the order of the said Appellate Division having been duly filed together with the record in the office of the Clerk of the Surrogates' Court, County of New York, [fol. 42] and said costs having been duly taxed by the Clerk of this Court.

Now on motion of N. Joseph Slicklen, Esq., attorney for the Public Administrator, it is

Ordered, adjudged, and decreed that the order of the Appellate Division be and the same is hereby made the order of this Court, and it is further

Adjudged that the Public Administrator recover of the objectant, Magno Santovincenzo, Consul of the Kingdom of Italy at New York, the sum of Eighty-two and 50/100 ($82.50) Dollars, the costs of said appeal, as taxed, and that the Public Administrator have execution therefor.

James A. Foley, Surrogate.

[fol. 26] Q. When was it lost the first time?

A. The first time it was lost on January 2, 1925.

Q. Did you make out a new card at that time?

A. Yes, made out a new card.

Q. Can you tell us the information furnished to you by the decedent at that time in reference to his address particularly?

A. That was the same on the new card.

Q. What was that?

A. 305 East 76th Street.

Q. Then was the book lost again?

A. Then the book was lost.

By the Surrogate:

Q. Your own letter says new book issued October 4, 1924. Have you got that date?

A. Yes, it was the last book, No. 5770. It was closed on May 26, 1925.

Q. That is the time the new book was issued?

A. Yes.

Q. May 26, 1925?

A. Lost on September 29, 1924, and January 2, 1925.

Q. Was the residence given on the issuance of the new book in May, 1925?

A. The same residence, 365 East 76th Street.

The Surrogate: Did he die at that residence, Mr. Slicklen?

Mr. Slicklen: He did.

Q. Have you got any other information there dealing with this man's affairs, birthplace, or anything else?

A. That is all.

Cross-exaxmination.

By Mr. Atkins:

Q. Are you the man that made out this card?

A. No.

[fol. 27] Mr. Atkins: I merely wanted to call attention to the fact that where the mother's name is given it is only the first name, Angelina; the father's name, Salvatore; just the first name.

The Witness: We ask only the first name in the bank of the father and mother on the pedigree.

By the Surrogate:

Q. That card was issued in the regular course of business?

A. Yes.

Q. And made out by the clerk when the account was opened or when a new book was issued?

A. Yes.

GUISEPPE SPERANZO, sworn and examined on behalf of the Acting Consul General of Italy, having been duly sworn, testified as follows (through Mario De Optatis, interpreter):

Direct examination.

By Mr. Atkins:

Q. Where do you live?

A. 933 East 217th Street, New York City.

Q. Where were you born?

A. Italy.

Q. How old are you?

A. 73.

Q. Did you know Antonio Comincio, the decedent in this case?

A. About 34 years.

Q. Where did you first become acquainted with him?

A. In Italy.

Q. Did you live in the same town the deceased did in Italy?

A. Yes.

Q. How well did you know him there?

A. Yes, I did know him well for some time.

Q. What were you chums?

A. Very close. We always went fishing together.

[fol. 28] Q. Who did the deceased live with in Italy?

A. When he lived in Italy at the beginning he lived with his father, and then he deserted and came here.

[fol. 43] IN SUPREME COURT OF NEW YORK, APPELLATE DIVISION

[Title omitted]

ORDER DENYING LEAVE TO APPEAL TO COURT OF APPEALS—Oct. 17, 1930

The above named appellant having moved for leave to appeal to the Court of Appeals from the order of this Court entered herein on the 23rd day of June, 1930.

Now, upon reading and filing the notice of motion, with proof of due service thereof, and the affidavit of Ralph Atkins in support of said motion and the affidavits of N. Joseph Slicklen and Victor R. Kaufmann in opposition thereto, and after hearing Mr. Ralph Atkins for the motion and Mr. N. Joseph Slicklen, of counsel for the Public [fol. 44] Administrator of the County of New York, and Mr. Victor R. Kaufmann, Deputy Assistant Attorney General, opposed,

It is hereby unanimously ordered that the said motion be and the same is hereby denied with $10.00 cost.

Enter.

E. R. F.

[fol. 45] IN COURT OF APPEALS OF NEW YORK

In the Matter of the Judicial Settlement of the Account of Proceedings of the PUBLIC ADMINISTRATOR OF THE COUNTY OF NEW YORK, Administrator, &c., of Antonio Comincio, Deceased; MAGNO SANTOVINCENZO, Acting Consul General of Italy at New York, Appellant; JAMES F. EGAN, Public Administrator of the County of New York, as Administrator, &c., of Antonio Comincio, Deceased, and HAMILTON WARD, Attorney General, &c., Respondents

ORDER DENYING LEAVE TO APPEAL TO COURT OF APPEALS—Dec. 2, 1930

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part

of the appellant herein, and papers having been duly submitted thereon, and due deliberation thereupon had:

Ordered, that the said motion be and the same hereby is denied with ten dollars' costs and necessary printing disbursements.

A copy.

John Ludden, Deputy Clerk. (Seal of the Court.)

[fol. 46] In Surrogates' Court of New York County

[Title omitted]

Order on Remittitur—Dec. 11, 1930

Magno Santovincenzo, Consul of the Kingdom of Italy at New York, having moved the Appellate Division of the Supreme Court, First Department, for leave to appeal to the Court of Appeals from the order entered herein on the 23rd day of June, 1930, and said motion having been on the 17th day of October, 1930, unanimously denied with Ten ($10) Dollars costs, and a certified copy of the order of said Appellate Division having been filed in the office of the Clerk of the Surrogates' Court, County of New York,

Now on motion of N. Joseph Slicklen, Esq., Attorney for the Public Administrator, it is

Ordered, adjudged, and decreed that the order of the Appellate Division be and the same is hereby made the [fol. 47] order of this Court, and it is

Further adjudged that the Public Administrator recover of the objectant, Magno Santovincenzo, Consul of the Kingdom of Italy at New York, the sum of Ten ($10) Dollars, the costs of said motion, and that the Public Administrator have execution therefor.

James A. Foley, Surrogate.

[fol. 48] In Surrogates' Court of New York County

[Title omitted]

Order on Remittitur—Dec. 15, 1930

Magno Santovincenzo, Consul of the Kingdom of Italy at New York, having moved the Court of Appeals from the

order entered herein by the Appellate Division of the Supreme Court, First Department, on the 23rd day of June, 1930, and said motion having been on the 2nd day of December, 1930, unanimously denied with Ten ($10) Dollars costs, and printing disbursements, and a certified copy of the order of said Court of Appeals having been filed in the office of the Clerk of the Surrogates' Court, County of New York,

Now on motion of N. Joseph Slicklen, Esq., Attorney for the Public Administrator, it is

Ordered, adjudged, and decreed that the order of the Court of Appeals be and the same is hereby made the order [fol. 49] of this Court, and it is

Further adjudged that the Public Administrator recover of the objectant, Magno Santovincenzo, Consul of the Kingdom of Italy at New York, the sum of Fourteen and 60/100 ($14.60) Dollars, the costs and printing disbursements of said motion, and that the Public Administrator have execution therefor.

James A. Foley, Surrogate.

[fol. 50] In Surrogates' Court of New York County

[Title omitted]

Order of Substitution—Feb. 19, 1931

Upon the subjoined consent, it is hereby

Ordered, that John J. Bennett, Jr., Attorney General of the State of New York, be and he is hereby substituted in the place of Hamilton Ward, former Attorney General of the State of New York, as the representative of the State of New York in this proceeding.

James A. Foley, Surrogate.

We hereby consent to the entry of the foregoing order.

N. Joseph Slicklen, Attorney for Public Administrator. John J. Bennett, Jr., Attorney General of the State of New York, by Peter J. Brancato, Deputy Attorney General, in Charge of New York Office.

[fol. 51] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

PETITION FOR APPEAL

Antonio Comincio, a subject of the Kingdom of Italy, died in the County of New York, State of New York, and on or about March 10, 1925, letters of administration upon his estate were granted to the Public Administrator of the County of New York by the Surrogates' Court of the County of New York, State of New York.

Said Administrator thereafter instituted a proceeding in said Surrogates' Court for a judicial settlement of his accounts, and in said case the above named appellant prayed that the estate of the decedent be paid to him so that he might dispose of the same in accordance with the laws of Italy. He based his right thereto upon treaties of the United States.

[fol. 52] Said Surrogates' Court, nevertheless, by a decree entered by it in said case on July 3, 1929, directed disposition of the estate in accordance with the statutes of the State of New York, and thereby rendered a decision in favor of the validity of statutes of the State of New York the validity of which were drawn in question on the ground of their being repugnant to treaties of the United States, and also rendered a decision against the validity of treaties of the United States.

The above named appellant appealed from said decree of said Surrogates' Court to the Appellate Division of the Supreme Court of the State of New York, in and for the First Judicial Department, and said Appellate Division thereafter unanimously affirmed said decree by an order made and dated June 23, 1930.

The record in said case was thereupon remitted to said Surrogates' Court, and by an order of said Surrogates' Court made on July 17, 1930, said order of the Appellate Division was made the order of said Surrogates' Court.

By the law of New York no further appeal could be taken, and the determination of the Appellate Division was final, unless an appeal was allowed either by the Appellate Division or by the Court of Appeals, the highest court of the State.

The above named appellant applied to the Appellate Division for leave to appeal to the Court of Appeals, and by an order of said Appellate Division made on October 17, 1930, [fol. 53] leave to appeal was denied.

A certified copy of the owner of the Appellate Division denying leave to appeal was filed in the office of the Clerk of said Surrogates' Court, and by an order of said Surrogates' Court made on December 11, 1930, the order of the Appellate Division was made the order of said Surrogates' Court.

The above named appellant also applied to the Court of Appeals for leave to appeal to said Court of Appeals, and by an order of said Court of Appeals made on December 2, 1930, the motion for leave to appeal was denied.

A certified copy of the order of the Court of Appeals denying leave to appeal was filed in the office of the Clerk of the Surrogates' Court and by an order of said Surrogates' Court made on December 15, 1930, said order of the Court of Appeals was made the order of said Surrogates' Court; and the record in said case now remains in said Surrogates' Court.

In said decree and orders, and in the proceedings had prior thereto, certain errors were committed to the prejudice of the appellant herein, which will more in detail appear from the assignment of errors filed with this petition.

Wherefore said Magno Santovincenzo, Consul of the [fol. 54] Kingdom of Italy at New York, respectfully prays for the allowance of an appeal to the Supreme Court of the United States from the Surrogates' Court of the County of New York, State of New York, to the end that the record in said case may be removed into the Supreme Court of the United States and the errors complained of examined and corrected and said decree and orders reversed; and that a transcript of the record, proceedings and papers in said case, duly authenticated, may be sent to the Supreme Court of the United States.

Dated February 24, 1931.

Magno Santovincenzo, Consul of the Kingdom of Italy at New York, by Carroll G. Walter, Attorney.

[fol. 55] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ASSIGNMENT OF ERRORS AND PRAYER FOR REVERSAL

Now comes Magno Santovincenzo, Consul of the Kingdom of Italy at New York, the appellant above named, and respectfully submits that in the record, proceedings and final decree of the Surrogates' Court of the County of New York, State of New York, in the cause mentioned in the petition herewith presented, there is manifest error in this, to wit:

1. The State courts erred in sustaining the validity of the statutes of New York with respect to the disposition of the estate of a subject of the Kingdom of Italy dying in New York without relations or partners, as against the claim that under the treaties of the United States the appellant, as Consul of the Kingdom of Italy at New York, was entitled to receive such estate so that he may dispose of the same in accordance with the laws of Italy.

[fol. 56] 2. The State courts erred in disposing of the estate of a subject of the Kingdom of Italy in accordance with the statutes of the State of New York instead of in accordance with the treaties of the United States.

3. The State courts erred in giving effect to the statutes of New York instead of to the treaties of the United States.

4. The State courts erred in refusing to direct payment of the estate to the appellant as Consul of the Kingdom of Italy at New York.

5. The State courts erred in directing the administrator to dispose of the balance of the estate in his hands in accordance with statutes of the State of New York.

Wherefore, and for divers other reasons upon which the said decree was made, the appellant prays that said decree may be reversed, and that the appellant be restored to all things that he has lost by reason thereof.

Carroll G. Walter, Counsel for Appellant, 72 Wall Street, Borough of Manhattan, City of New York.

[fol. 57] IN SUPREME COURT OF THE UNITED STATES

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York, Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Antonio Comincio, Deceased, and John J. Bennett, Jr., Attorney-General of the State of New York, Appellees

ORDER ALLOWING APPEAL

The above named appellant having prayed for the allowance of an appeal to the Supreme Court of the United States from the Surrogates' Court of the County of New York, State of New York, to review and reverse a decree made by said Surrogates' Court in the matter of the judicial settlement of the account of proceedings of the Public Administrator of the County of New York as administrator of the goods, chattels and credits of Antonio Comincio, deceased (said decree having been affirmed by the Appellate Division of the Supreme Court of the State of New York and a review of said decree having been refused by the Court of Appeals of the State of New York on December 2, 1930, and the record in said cause having been remitted to said Surrogates' Court, where the same now remains), [fol. 58] and having presented his petition for appeal, assignment of errors and prayer for reversal, pursuant to the statutes and rules of the Supreme Court of the United States in such case made and provided; it is

Ordered that an appeal be and the same is hereby allowed to the Supreme Court of the United States from the Surrogates' Court of the County of New York, State of New York, in the cause in which the above mentioned decree was made, and from the decree of said Surrogates' Court in said cause as so affirmed by the Appellate Division of the Supreme Court of the State of New York; and it is further

Ordered that the Clerk of said Surrogates' Court prepare and certify a transcript of the record, proceedings and decree in said cause and transmit the same to the

Supreme Court of the United States, so that he shall have the same in said court within thirty days from this date; and it is further

Ordered that security for costs on appeal be given in the sum of five hundred dollars.

Dated February 25th, 1931.

Harlan F. Stone, Associate Justice Supreme Court of the United States.

[fols. 59-65] Bond on appeal for $500.00, approved February 25, 1931, omitted in printing.

[fols. 66 & 67] Citation, in usual form, showing service on N. J. Slicklen and A. W. Jones, omitted in printing.

[fol. 68] In Surrogates' Court of New York County.

Stipulation re Transcript of Record

It is hereby stipulated by and between the undersigned attorneys for the respective parties herein that the papers to be transmitted to the Supreme Court of the United States by the Clerk of the Surrogates' Court of the County of New York, State of New York, pursuant to the appeal allowed herein by Hon. Harlan F. Stone, Associate Justice of the Supreme Court of the United States, on February 25, 1931, are the following, and that this stipulation shall take the place of the præcipe required to be filed by counsel for the respective parties under and pursuant to Rule 10 of the Rules of the Supreme Court of the United States:

1. The printed case on appeal upon which the case was heard in the Appellate Division of the Supreme Court of the State of New York.

2. The Appellate Division's order of affirmance, made on June 23, 1930; the Surrogate's order on remittitur, made on July 17, 1930; the Appellate Division's order denying leave to appeal to the Court of Appeals, made on October 17, 1930; the order of the Court of Appeals denying leave to appeal, made on December 2, 1930; the Surrogate's order

on remittitur, made upon the order of the Appellate Division denying leave to appeal on December 11, 1930; the Surrogate's order on remittitur, made upon the order of the Court of Appeals denying leave to appeal on December 15, 1930; the order of substitution made on February 19, 1931.

[fol. 69] 3. The petition for appeal to the Supreme Court of the United States; the assignment of errors and prayer for reversal accompanying said petition; the order allowing said appeal; the citation thereon; and the bond on appeal; all filed with the Clerk of the Surrogates' Court of the County of New York on February —, 1931.

4. The present stipulation.

It is further stipulated that the foregoing consist of true and correct copies of all said papers, now on file in the office of the Clerk of the Surrogates' Court of the County of New York, and that the Clerk of said Surrogates' Court may certify the foregoing as the transcript of record upon said appeal to the Supreme Court of the United States without further formality.

Dated New York City, February 27th, 1931.

Ralph Atkins, Attorney for Magno Santovincenzo, Consul of the Kingdom of Italy at New York. N. Joseph Slicklen, Attorney for Public Administrator. John J. Bennett, Jr., Attorney General of the State of New York, by Robert P. Beyer, Deputy Assistant Attorney General.

[fols. 70 & 71] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 72] IN SUPREME COURT OF THE UNITED STATES

STATEMENT OF POINTS TO BE RELIED UPON AND DESIGNATION TO PRINT ENTIRE RECORD—Filed Mar. 10, 1931

Now comes the above named appellant, pursuant to paragraph 9 of Rule 13 of the Rules of this Court, and states that the points upon which he intends to rely in this court in this case are as follows:

Point I. Under the treaties of the United States set forth in appellant's answer herein, the appellant was and is entitled to receive the estate of the decedent.

Point II. Those treaties constitute the supreme law of the land, and every state statute inconsistent therewith is invalid.

[fols. 73 & 74] Point III. The statutes of New York, in accordance with which the courts below directed payment of the estate, are inconsistent with those treaties and hence invalid.

Point IV. The courts below, in substance and effect, have denied the validity of the treaties.

The appellant further represents that the whole of the record, as filed, is necessary for the consideration of the case, except the bond and citation upon this appeal.

Carroll G. Walter, Counsel for Appellant.

Service of the foregoing statement and designation is hereby admitted this 27th day of February, 1931.

N. Joseph Slicklen, Attorney for Public Administrator. John J. Bennett, Jr., Attorney General of the State of New York, by Robert P. Beyer, Deputy Attorney General.

[fol. 75] [File endorsement omitted.]

Endorsed on cover: File No. 35,769. New York, Surrogates' Court of the County of New York. Term No. 787. Magno Santovincenzo, Consul of the Kingdom of Italy at New York, appellant, vs. James F. Egan, Public Administrator, etc., and John J. Bennett, Jr., Attorney General of the State of New York. Filed March 10, 1931. File No. 35,709.

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Supreme Court of the United States

OCTOBER TERM, 1930

No. 31

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of ANTONIO COMINCIO, Deceased, and JOHN J. BENNETT, JR., Attorney-General of the State of New York,

Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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Supreme Court of the United States

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APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK.

STATEMENT AS TO JURISDICTION.

Pursuant to Rule 12 of the rules of this court, the appellant respectfully submits:

A.

Statutory Provision Sustaining Jurisdiction.

Judicial Code Sec. 237 (*a*), as amended by Act of February 13, 1925, 43 Stat. 936 (U. S. Code, Title 28, Sec. 344), provides:

"(*a*) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

By Act of January 31, 1928, 45 Stat. 54, as amended by Act of April 26, 1928, 45 Stat. 466 (U. S. Code, Title 28, Sec. 861 *a*, 861 *b*), writs of error were abolished, and it was provided that

"All relief which heretofore could be obtained by writ of error shall hereafter be obtainable by appeal."

B.

Date of Decree and Date of Application for Appeal.

The original decree of the Surrogates' Court was entered on July 3, 1929 (R. 4-7),* and was affirmed by the Appellate Division of the Supreme Court of the State of New York on June 23, 1930 (R. 39, 40). Leave to appeal to the Court of Appeals of New York was denied by the Appellate Division on October 17, 1930 (R. 43, 44) and then

*All references to the record are to the pages of the certified transcript prepared by the Clerk of the Surrogates' Court and now on file with the Clerk of this Court. The record has not yet been printed.

by the Court of Appeals on *December 2, 1930* (R. 45). The record was remitted to the Surrogates' Court, and upon the remittitur the orders of the Appellate Division and of the Court of Appeals were made the orders of the Surrogates' Court (R. 41, 46, 48).

The application for appeal was presented to and the appeal was allowed by Mr. Justice STONE on *February 25, 1931* (R. 57, 58), which was within three months from the date of the order of the Court of Appeals denying the application for leave to appeal to that court (R. 45).

C.

Nature of the Case and of the Ruling Below.

The opinion of the Surrogates' Court is printed at R. 33-36, and is reported in 135 N. Y. Misc. 733 and 240 N. Y. Supp. 691. The Appellate Division affirmed without opinion, 229 N. Y. App. Div. 862, and no opinion was delivered by the Court of Appeals.

Antonio Comincio was an Italian subject (R. 27, 28, 31) and died in New York, intestate, leaving no relatives (R. 29). Administration upon his estate was granted to the Public Administrator of the County of New York (R. 15). In a proceeding in the Surrogates' Court for a judicial settlement of the accounts of the administrator (R. 11-21), the appellant herein, in his capacity as Consul of Italy, claimed the estate by virtue of two treaties of the United States (R. 9-11), *viz.*,

(*a*) Consular Convention between United States and Italy containing the "most favored nation" clause as follows (R. 10):

"The respective Consuls General, consuls, vice

consuls and consular agents as likewise the consular chancellors, secretaries, clerks or attachés, shall enjoy in both countries all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

(*b*) Treaty with Persia, proclaimed August 18, 1857, Article VI of which provides (R. 10):

"In case of a *citizen or subject* of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects *shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citizen so that he may dispose of them in accordance with the laws of his country.*"

Despite that claim, the Surrogates' Court ruled that the estate should pass under and according to *the statutes of New York.* The assigned reason for such ruling was that the deceased was *domiciled* in New York and the law of the domicile controls the disposition of personalty.

The validity of the statutes of New York was of course obviously and necessarily assailed by the assertion of the claim under the treaties. The Italian Consul plainly had no rights under the New York statutes, and those statutes necessarily would control unless the treaties opposed them. The assertion of the treaties as controlling the disposition of the estate thus necessarily denied the validity of the statutes.

Moreover, the opinion of the Surrogates' Court leaves no doubt that it fully understood that the validity of the New York statutes was directly drawn in question upon the

ground of their repugnance to the treaties, because it expressly referred to the statutes and opposed them to the claims made under the treaties.

In its opinion it said:

"Pursuant to our statutes this amount (the net estate) would be directed in the decree to be paid into the city treasury of the City of New York to await ascertainment of the next of kin. Ultimately the amount would find its way into the treasury of the State of New York." (R. 33.)

* * * *

"It is an elementary rule of the laws of estates that the succession of personal property left by a decedent is governed exclusively by the law of the actual domicile of the intestate at the time of his death (Story's Conflict of Laws, 8th ed., section 481; Moultrie *v.* Hunt, 23 N. Y. 394; Depuy *v.* Wurtz, 53 N. Y. 556; Cross *v.* United States T. Co., 131 N. Y. 330). Citizenship and nationality on the one hand and domicile on the other involve different principles, but succession to personalty is based upon the finding of domicile only. It is beyond comprehension that the treaty between the United States and Persia ever contemplated any abrogation of this basic rule of law. An examination of the provisions of the Persian Treaty and of the Treaty with Italy compels the interpretation that the consular rights were limited strictly to the receipt of the property of a national of Italy dying here, but domiciled in that country." (R. 35.)

* * * *

"*In this proceeding the rights granted by the treaty must be held to be subordinate to the succession statutes of our state.* Cases may and do arise where nationals of the Kingdom of Italy, temporarily residing here, but domiciled in that country, may leave personal property which passes under its laws. But

in each case the question of domicile when disputed must first be determined. I hold, therefore, that the intestate law of Italy has no application to the present estate. The decree should provide for payment of the balance of the estate into the treasury of the City of New York for the benefit of the unknown next of kin of this decedent, *pursuant to the statute of 1898, which regulates the duties of the public administrator in the disposition of the funds held by him.*" (R. 36.)

In its decree it directed payment of the estate into the City Treasury of the City of New York "for the use and benefit of the unknown next of kin of the above decedent, together with the accumulated interest if any" (R. 7).

The pertinent parts of the New York statutes which the State courts have thus sustained as against the claim made under the treaties are set forth in an appendix. Briefly stated, they are to this effect: Chapter 230 of the Laws of 1898 defines the rights, powers, duties and obligations of the Public Administrator of the County of New York. Money in his hands which is payable to unknown persons must be paid "into the treasury of the city" (Sec. 24, subd. 14, construed in *Matter of Hammer*, 105 Misc. 721). Such funds are regarded as "court funds" and after remaining with the city for twenty years are paid to the Treasurer of the State (*State Finance Law*, Sec. 44, as construed in *Matter of People* v. *Maltbie*, 102 Misc. 575, affd. 184 App. Div. 743 and 226 N. Y. 641, and in *People* v. *Keenan*, 110 App. Div. 537, affd. 185 N. Y. 600). If no one appears and proves ownership, *i. e.*, where there is a failure of next of kin, the property reverts to the State of New York (*Johnston* v. *Spicer*, 107 N. Y. 185, 196).

By the law of Italy, the property, upon like failure of relatives, passes to the Government of Italy (R. 9, 10).

The ultimate question in the case, therefore, is whether the property of an Italian national dying in New York without relatives shall go to the State of New York under its statutes or to the Government of Italy; and it would be most unfortunate, we submit, if such a question, involving the right of a foreign government to the property of one of its nationals, should be finally determined by the courts of New York without any consideration thereof by this court.

D.

Cases Believed to Sustain Jurisdiction.

1. The appeal is properly taken from the Surrogates' Court, because that court has the record.

Salomon v. *State Tax Commission*, 278 U. S. 484, 486;
Hodges v. *Snyder*, 261 U. S. 600;
Sioux Remedy Co. v. *Cope*, 235 U. S. 197, 200.

2. The appeal was taken in time because within three months from the date when the Court of Appeals denied leave to appeal.

American Ry. Express v. *Levee*, 263 U. S. 19, 21;
McMaster v. *Gould*, 276 U. S. 284;
Andrews v. *Virginian Ry. Co.*, 248 U. S. 272.

3. There is no dispute about the *construction* of the statutes of New York, and the courts below concededly have decided in accordance with the statutes of New York. They thereby sustained the *validity* of State statutes the validity of which were drawn in question upon the ground of their being repugnant to treaties of the United States.

In *Clark* v. *Deckebach*, 274 U. S. 392, a subject of the King of England set up that under a treaty with Great Britain he was entitled to a license to run a pool room despite an ordinance of Cincinnati which prohibited the issuance of such licenses to aliens; and it was held that his claim drew in question the validity of the ordinance as violating the treaty, and that the judgment against him was reviewable upon writ of error although this court ultimately construed the treaty as not giving the right claimed under it.

In *Asakura* v. *Seattle*, 265 U. S. 332, a subject of the Emperor of Japan sued to restrain enforcement of an ordinance of Seattle making it unlawful to engage in the business of pawnbroker unless licensed and providing that no license should be issued except to citizens of the United States; and an adverse judgment was reviewed here upon writ of error—the question being whether the treaty with Japan gave him a right to engage in the business despite the ordinance.

In *New Orleans & N. E. R. R. Co.* v. *Scarlet*, 249 U. S. 528, the State court applied a State statute to an action brought under the Federal Employees' Liability Act, and its judgment was held to be reviewable here upon writ of error. This court there said (p. 530):

> "The conflict of a state statute with a valid law of the United States being involved and the decision having been in favor of the validity of the statute, the case is properly here on a writ of error; and the petition for a writ of certiorari is denied."

In the case at bar, the conflict of a state statute with a valid treaty of the United States is involved, and the decision is in favor of the validity of the statute; and it follows that here, too, the case is properly here by appeal.

In *Kennedy* v. *Supreme Lodge*, 252 U. S. 411, the action

was brought in Illinois upon a judgment rendered in Alabama for negligently causing the death of the plaintiff's intestate in Alabama. The State court applied a statute of Illinois which provided that no action should be brought in that State for damages occasioned by death occurring elsewhere, despite plaintiff's reliance upon the full faith and credit clause of the Federal Constitution, and that judgment was held reviewable here upon writ of error. The holding is expressed in the head-note as follows (p. 411):

> "A judgment of a state supreme court giving a meaning and effect to a statute of the State which brings it in conflict with the Federal Constitution is reviewable by writ of error."

In *Dahnke-Walker Co. v. Bondurant*, 257 U. S. 282, the underlying point in controversy was whether the contract sued upon was a part of interstate commerce. If it were, the plaintiff was entitled to maintain the suit despite its non-compliance with a State statute regulating the right of foreign corporations to sue in courts of the State. The State court held that the contract was not a part of interstate commerce and hence, in accordance with the State statute, dismissed the suit. Such ruling was held to be a decision in favor of the *validity of a State statute* the validity of which was drawn in question upon the ground of its being repugnant to the Constitution of the United States, and hence reviewable here upon writ of error—despite a strong dissent to the effect that, not the *validity* of the State statute, but only the *propriety of the application* of the statute, was drawn in question. In the opinion of this court, by Mr. Justice VAN DEVANTER, it was said (pp. 288-290):

> "In the state court the plaintiff did not simply claim a right or immunity under the Constitution of the United States, but distinctly insisted that as to the

transaction in question the Kentucky statute was void, and therefore unenforceable, because in conflict with the commerce clause of the Constitution. The court did not accede to the insistence, but *applied* and *enforced* the statute. *Of course, that was an affirmation of its validity when so applied.* (Citing cases.) The case is therefore of the class described in the first of the provisions which we have quoted from the jurisdictional section. That the statute was not claimed to be invalid *in toto* and for every purpose does not matter. A statute may be invalid as applied to one state of facts and yet valid as applied to another. (Citing cases.) Besides, a litigant can be heard to question a statute's validity only when and so far as it is being or is about to be applied to his disadvantage. (Citing cases.) *Neither does it matter on what ground the court upheld and enforced the statute.* The provisions quoted from the jurisdictional section show that in cases where the validity of a state statute is drawn in question because of alleged repugnance to the Constitution the mode of review depends on *the way in which the state court resolves the question.* If it be resolved in favor of the validity of the statute, the review may be on a writ of error; and if it be resolved against the validity the review can only be on writ of certiorari. *The provisions take no account of the particular grounds or reasons on which the decision is put.*

* * * *

"Our conclusion on the jurisdictional question is that, as the state court *applied and enforced* to the plaintiff's disadvantage a state statute which the plaintiff seasonably insisted as so applied and enforced was repugnant to the Constitution and void, the case is rightly here on writ of error."

In *Bryant* v. *Zimmerman*, 278 U. S. 63, this court, in another opinion by Mr. Justice VAN DEVANTER, discussing

Section 237 (*a*) of the Judicial Code, as amended, and sustaining jurisdiction upon writ of error, said (p. 67):

> "There are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential, but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented.
>
> "Of course the decision must have been against the claim of invalidity, but it is not necessary that the ruling shall have been put in direct terms. *If the necessary effect of the judgment has been to deny the claim, that is enough.*"

4. The case at bar also falls within the first class of cases specified in Section 237 (*a*) because the courts below have, in substance and effect, *denied the validity of the treaties.* Indeed, the denial of such validity is expressed in actual words, the Surrogate having said (R. 36):

> "In this proceeding the *rights granted by the treaty* must be held to be *subordinate* to the succession statutes of our State."

E.

Special and Important Reasons for Review.

The State courts have here decided a federal question of substance not heretofore expressly determined by this court, and they have decided it in a way which we respectfully submit is not in accord with decisions of this court in analogous cases.

For example, in *Nielsen* v. *Johnson*, 279 U. S. 47, this court said (p. 52):

"When a treaty provision fairly admits of two constructions, one restricting, the other enlarging rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura* v. *Seattle*, 265 U. S. 332; *Tucker* v. *Alexandroff*, *supra*; *Geofroy* v. *Riggs*, *supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must prevail over inconsistent state enactments. See *Ware* v. *Hylton*, 3 Dall. 199; *Jordan* v. *Tashiro*, *supra*; cf. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336."

The State courts, moreover, have denied a right asserted by a foreign and friendly Government; and the right so asserted should be considered and decided by this court, so that the foreign Government shall not be made to feel that its claims under its treaty have been denied by the courts of the State with whom its controversy exists, without any consideration thereof by a tribunal of our *National* Government.

This case, moveover, does not stand alone. There is now at least one other similar case now pending in the State courts, the further prosecution of which is being held in abeyance awaiting the final result in this case.

If jurisdiction did not exist under Section 237 (*a*), a writ of certiorari should be granted. See *Longest* v. *Langford*, 274 U. S. 499.

Respectfully submitted,

CARROLL G. WALTER,
Counsel for Appellant.

March, 1931.

APPENDIX

Laws of New York 1898, Chapter 230.

"AN ACT in relation to the public administrator of the County of New York, defining his rights, powers, duties and obligations.

* * * * * * *

"§ 24. Whenever the public administrator shall become vested with the right of administering upon any estate whether by right of his office or by grant of original letters of administration, or letters of administration *de bonis non*, or letters of administration with the will annexed, he shall possess the following rights and powers and be subject to the following obligations:

* * * * * * *

"1. He shall have all the rights, powers and authority given by law to any administrator, except so far as the same may be qualified by the provisions of this act.

"2. He may, like any administrator, sue and be sued.

* * * * * * *

"10. He may, in his discretion, proceed as other administrators are allowed by law, after the expiration of six months from the time he became vested with the powers of an administrator on any estate, to have a final settlement of his accounts in relation to such estate, and with the like effect.

* * * * * * *

"13. He shall pay all legacies and shares of the estate of the deceased according to the decrees of the surrogate; but he may in his discretion pay a legacy or a distributive share payable to an infant having no general guardian ap-

pointed by a court of this state to his father, and if his father be dead, then to his mother, and if both be dead, then to the person with whom said infant resides, for the use and benefit of such infant; but the payment or an aggregate of payments so made shall not exceed the sum of two hundred and fifty dollars.

"14. *The balance of any money in his hands on the adjustment of his accounts, whether payable to persons unknown or if known whose places of residence are unknown, shall be paid immediately into the treasury of the city;* and he shall transfer and deliver to the corporation of the said city all public stocks, stocks and bonds of any incorporated company, and other securities belonging to the estate of the deceased, if any there be in his hands remaining unsold."

State Finance Law

(Laws 1909, Chapter 58)

"§ 44. *When money paid into court to be paid to state treasurer.* Whenever any sum of money, paid into court, shall have remained in the hands of any county treasurer, or of the chamberlain of the city of New York, for the period of twenty years, it shall be paid over by such officer with all accumulations of interest thereon, after deducting his legal fees, to the treasurer of the state of New York. The said treasurer shall pay such sum to the owner or owners thereof upon the presentation to him of the warrant of the comptroller therefor. The comptroller shall draw his warrant for such sum upon the presentation to him of an order of the court made in accordance with section seven hundred and fifty-one of the code of civil procedure and upon due notice to said comptroller."

Civil Practice Act, Section 137.

(Formerly Code of Civil Procedure, Section 751)

"§ 137. *Funds or property not to be surrendered without order.* No money, security or other property which shall have been placed in the custody of the court shall be surrendered without the production of a properly certified copy of an order of the court in whose custody said money, security or other property shall have been placed, duly made and entered, directing such disposition."

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MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

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against

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Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK.

BRIEF FOR APPELLANT

CARROLL G. WALTER,
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ARGUMENT

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BRIEF FOR APPELLANT.

Opinion Below.

The opinion of the Surrogates' Court is reported in 135 N. Y. Misc. 733 and 240 N. Y. Supp. 691, and is printed at R. 22-24. The Appellate Division affirmed without opinion, 229 N. Y. App. Div. 862, and no opinion was written in denying leave to appeal to the Court of Appeals.

Jurisdiction.

A statement as to jurisdiction pursuant to Rule 12 was filed herein on March 20, 1931, and reference is respectfully made thereto.

Question Presented.

The underlying and ultimate question in the case is whether the property of an Italian national dying in New York intestate and without relatives passes (*a*) to the State of New York under its statutes, or (*b*) to the Government of Italy under the treaties hereinafter mentioned.

Statutes and Treaties Involved.

The treaties under which the appellant claims are as follows (See R. 6, 7):

(*a*) Consular Convention between the United States and Italy, 20 Stat. 725, 732, Article XVII of which provides (R. 6, 7; 20 Stat. 732):

> "The respective Consuls General, consuls, vice-consuls and consular agents as likewise the consular chancellors, secretaries, clerks or attaches, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favored nation."

(*b*) Treaty between the United States and Persia, 11 Stat. 709, 710, Article VI of which provides (R. 6; 11 Stat. 710):

> "In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; *and in case he has no relations or partners, his effects shall be delivered up to the Consul or agent of the nation of which the deceased was a subject or citi-*

zen, so that he may dispose of them in accordance with the laws of his country.''

By the law of Italy the property of one dying intestate and without a spouse or relatives passes ''to the patrimony of the State'' (Italian Civil Code, Book III, Title 2, chapter 1, Section 721, quoted at R. 6).

The pertinent parts of the New York statutes which the courts below have sustained as against the appellant's claim under the treaties are set forth in the *Appendix* to the *Statement as to Jurisdiction* heretofore filed herein. Briefly stated, they are to the effect that money in the hands of the Public Administrator of the County of New York which is payable to unknown persons must be paid into the treasury of the City of New York, and after remaining there for twenty years it is paid to the Treasurer of the State. If no one appears and proves ownership, *i. e.*, where there is a failure of next of kin, the property reverts to the State of New York as an escheat. (See *infra*, pp. 20, 21.)

Statement of the Case.

Antonio Comincio was a native-born Italian subject (R. 17, 21) who died in New York, intestate, leaving no relatives (R. 19). Administration upon his estate was granted to the Public Administrator of the County of New York on March 10, 1925 (R. 7, 9). The administrator thereafter petitioned the Surrogates' Court for a judicial settlement of his account, and in his petition he stated that it appeared from documents filed with him that the decedent left no kin surviving and that the Italian Consul made claim to the estate (R. 8). The appellant, in his official consular capacity, answered the petition, and in his

answer he specially set up the treaties and Italian law above referred to and prayed that the balance of the estate be paid to him for distribution to the Kingdom of Italy (R. 6, 7). The Attorney General of New York was cited as the representative of the State of New York (R. 3).

Upon the hearing before the Surrogate there was testimony to the effect that about five years before his death Comincio had stated that he "wanted to retire and return back to Italy" (R. 21, 22); and appellant accordingly made the further contention that, in view of that declared intention to return to Italy, Comincio never lost his domicile of origin, and that succession accordingly was governed by the law of Italy irrespective of the treaties (R. 22, 23).

The Surrogate took the view, however, that such a vague and indefinite declaration of intention to return was unavailing as against Comincio's long-continued residence in New York, and he therefore *found as a fact* that Comincio's *domicile* was in New York and not in Italy (R. 23, 24).

The Surrogate then ruled that the succession of personal property "is governed exclusively by the law of the actual domicile of the intestate at the time of his death" (R. 23, 24), and he thereupon directed disposal of the estate in accordance with the statutes of New York (R. 24, 4, 5).

That the Surrogate fully understood that the validity of the New York statutes was directly drawn in question upon the ground of their repugnance to treaties of the United States, and that the question before him was whether he should direct distribution in accordance with the treaties or in accordance with the local statutes, is plainly apparent from his opinion. He first stated that under the New York statutes the net estate would be di-

rected to be paid into the treasury of the City of New York and ultimately would find its way into the treasury of the State of New York (R. 22). He then referred to the treaties upon which the appellant relied (R. 22) and stated that the Attorney General of the State of New York opposed appellant's contention (R. 22). Then, after finding as a fact that the decedent was *domiciled* in New York, he stated that the law of the domicile was controlling (R. 23, 24). He then said (R. 24):

> "Citizenship and nationality on the one hand and domicile on the other involve different principles, but succession to personalty is based upon the finding of domicile only. It is beyond comprehension that the treaty between the United States and Persia ever contemplated any abrogation of this basic rule of law. An examination of the provisions of the Persian Treaty and of the Treaty with Italy compels the interpretation that the consular rights were limited strictly to the receipt of the property of a national of Italy dying here, but domiciled in that country. In the comprehensive opinion of Judge CARDOZO in Matter of Adamo (212 N. Y. 214), the rights of the Italian consular officers under the treaty with this country are considered. In that case it was finally settled in the State of New York that our local statutes governed the appointment of administrators and that the treaty conferred no preference to letters of administration upon the Italian consul. Much of Judge CARDOZO's reasoning applies in the present situation. In this proceeding the rights granted by the treaty must be held to be subordinate to the succession statutes of our state."

The Surrogate's decree (R. 3-5) was affirmed by the Appellate Division June 23, 1930 (R. 26). Leave to appeal to the Court of Appeals was denied, first by the Appellate Division, and then by the Court of Appeals itself

(R. 28, 29). The latter denial was on December 2, 1930 (R. 28) and the order of the Court of Appeals was thereafter made the order of the Surrogates' Court on December 15, 1930 (R. 29, 30).

This appeal was then allowed by Mr. Justice STONE on February 25, 1931 (R. 34, 35).

Specification of Errors.

The errors assigned are as follows (R. 33):

1. The State courts erred in sustaining the validity of the statutes of New York with respect to the disposition of the estate of a subject of the Kingdom of Italy dying in New York without relations or partners, as against the claim that under the treaties of the United States the appellant, as Consul of the Kingdom of Italy at New York, was entitled to receive such estate so that he may dispose of the same in accordance with the laws of Italy.

2. The State courts erred in disposing of the estate of a subject of the Kingdom of Italy in accordance with the statutes of the State of New York instead of in accordance with the treaties of the United States.

3. The State courts erred in giving effect to the statutes of New York instead of to the treaties of the United States.

4. The State courts erred in refusing to direct payment of the estate to the appellant as Consul of the Kingdom of Italy at New York.

5. The State courts erred in directing the administrator to dispose of the balance of the estate in his hands in accordance with statutes of the State of New York.

Summary of Argument.

By the treaty with Italy the appellant is entitled to all the *rights, prerogatives,* and *privileges* granted to consuls of the most favored nation. By the treaty with Persia a consul has the right, prerogative, or privilege of having delivered up to him the effects of a subject of his country who dies within the United States without relations or partners "so that he may dispose of them in accordance with the laws of his country." That right applies to all subjects of the consul's country dying here, *regardless of the domicile of the decedent.* Nationality, not domicile, is the test.

Even if it be possible to construe the treaty as being limited to nationals not domiciled here, it is also susceptible of being construed as appellant construes it; and the settled rule as to the construction of treaties thus requires that appellant's construction be adopted.

The treaties are the supreme law of the land, and the local statutes being inconsistent therewith, the statutes are invalid.

Nevertheless, the courts below have directed that the estate be disposed of in accordance with New York statutes under which the property reverts to the State of New York as an escheat, instead of directing that it be delivered to appellant for disposal by him in accordance with the laws of Italy.

The courts below have thereby rendered a decision in favor of the validity of statutes of a State the validity of which was drawn in question on the ground of their being repugnant to treaties of the United States. They have also thereby rendered a decision against the validity

of a treaty of the United States, for the necessary effect of their decree is to sustain the State statutes and deny the rights asserted under the treaties.

POINT I.

Under the treaties of the United States set forth in appellant's answer herein, the appellant was and is entitled to receive the estate of the decedent.

The question in this case is to be carefully distinguished from the much-discussed question of the right of foreign consuls to *administer* the estates of their nationals (*Rocca* v. *Thompson*, 223 U. S. 317; *Matter of D'Adamo*, 212 N. Y. 214). No right of administration is here asserted. The estate is being administered by a local official, created by the statutes of New York, known as the Public Administrator of the County of New York. What is here involved is the *distribution* of the net estate remaining after administration is completed.

A.

The treaty with Italy (*ante*, p. 2) gives to her consuls "all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade of the most favored nation."

The treaty with Persia (*ante*, pp. 2, 3) provides that where "a *citizen* or *subject* of either of the contracting parties dying within the territories of the other" has no relations or partners "his effects shall be delivered up to the consul or agent *of the nation of which the deceased was a subject or citizen* so that he may dispose of them in accordance with the laws of his country."

The word "effects" unquestionably includes personal property of all kinds (19 *Corpus Juris* 1017; *Bouvier's Law Dictionary; Burrill's Law Dictionary; Todok* v. *Union State Bank*, 281 U. S. 449, 453, 454); and by the very words of the treaty, therefore, the property, in the absence of relations or partners, is to be delivered to the consul of the nation of which the decedent was a citizen or subject.

The treaty twice uses the phrase "citizen or subject" and says nothing whatever about domicile. If a citizen of the United States die in Persia, or if a subject of Persia die in the United States, the treaty comes into operation, regardless of whether such citizen or subject was or was not domiciled in the country in which he died. The test laid down in the treaty is *nationality* and *not* domicile; and in making domicile the test the courts below have plainly departed from the plain language of the treaty.

The Surrogate says it is "beyond comprehension" that the treaty ever contemplated any abrogation of "the rule that succession is governed by the law of the domicile." But *why* such abrogation is "beyond comprehension" he does not tell us, and we are at a loss to conceive a reason. On the contrary, it seems to us it cannot be doubted that that was the precise object of the treaty. The law of the domicile, as the Surrogate himself tells us, is controlling in the *absence* of a treaty, and to construe the treaty as not abrogating that rule is to convict the high contracting parties of entering into stipulations which were wholly futile and useless because amounting only to a restatement or declaration of the rule which would apply if there were no treaty.

Treaties generally are made for the purpose of conferring or obtaining some right or privilege not previously existing, and it would require strong evidence to show that

a treaty stipulation was intended as merely declaratory of an existing rule rather than as changing the existing rule. Here the evidence of intent is all the other way.

In the first place, the treaty carefully uses the words "citizen and subject" and refrains from saying anything about domicile, and it certainly cannot be doubted that those who made the treaty understood the meaning of those words and knew that one may be a citizen or subject of one country although domiciled in another.

In the second place, when construed as appellant construes it, the treaty coincides with and furthers the long-standing policy of the United States to have its consuls take possession of the estates of its citizens who die in foreign countries leaving no legal claimant there present and remit the same to this country. That policy is expressed in Section 1709 of U. S. Rev. Stat. (U. S. Code, Title 22, § 75, which originated in an Act of Congress of April 14, 1792, 1 Stat. 255. By the terms of that statute it is made the duty of consuls and vice-consuls of the United States "where the laws of the country permit" to take possession of the personal estate left by *citizens* of the United States, other than seamen belonging to any vessel, who shall die within their consulate "leaving no legal representative, partner in trade, or trustee by him appointed to take care of his effects" and to inventory the same, collect the debts due the deceased in the country where he died, pay the debts due from his estate which he shall have contracted there, sell such part of the property as is perishable and as is necessary for the payment of debts, and "transmit the balance of the estate to the Treasurer of the United States to be holden in trust for the legal claimant."* That

*The statute is quoted in full in the Appendix at p. 23, *infra*.

statute likewise refers to *citizens*, and pays no attention to domicile, and it unquestionably applies to all citizens even though domiciled abroad.

The Surrogate referred to *Matter of D'Adamo*, 212 N. Y. 214, as containing reasoning which supported his view (R. 24); but with one exception to be hereafter noted (*infra*, pp. 16, 17) we submit that, so far as the case is material at all, it sustains appellant's position rather than the position of the courts below.

The question involved in *Matter of D'Adamo* was whether or not a treaty with Sweden gives to foreign consuls a right to *administer* the estates of their nationals dying here even though there be other persons present who, under the local law, are qualified and willing to act as administrator. Rejecting a contrary intimation by this court in *Rocca* v. *Thompson*, 223 U. S. 317, 332, the New York Court of Appeals held that the treaty did not give such right to foreign consuls but merely added such consuls "to the list of those eligible as administrators so as to enable them to administer upon the estates of their fellow-citizens when no one having a prior right under the local law is competent or willing to act" (212 N. Y. 223). The treaty there involved contained the phrase "so far as the laws of each country will permit," and in reaching its conclusion the New York Court of Appeals placed great stress upon that phrase and held that it qualified the entire sentence in which it occurred (212 N. Y. 221-223). *No such phrase occurs in the treaty involved in the case at bar, and for that reason the decision in the D'Adamo case is wholly inapplicable.*

As *confirming* its construction of the Swedish treaty, however, the New York Court of Appeals referred to two circumstances which we submit are quite pertinent as

likewise confirming our own construction of the Persian treaty with which we are now concerned.

The first circumstance so mentioned by the Court of Appeals is that the function of consuls under established international practice is "to preserve derelict estates" (212 N. Y. 223). Now the estate of Comincio certainly is a derelict estate, and in construing the treaty as carrying that estate to the land of his birth, allegiance, and nationality, we certainly are construing it in a manner which harmonizes it with international practice and with the way in which the international negotiators must have understood it. We repeat, too, that it also harmonizes the treaty with the statutorily declared policy of the United States in particular (*supra*, p. 10).

The second circumstance so mentioned by the New York Court of Appeals in the *D'Adamo case* is that strange consequences would follow a different interpretation of the treaty there involved because (212 N. Y. 226):

> "It (the treaty) is not restricted in its operation to the estates of aliens who have died in the United States while temporarily sojourning here, but who have retained a domicile in their native lands. *It applies equally to the estates of aliens who have their domicile in the United States.*"

Now the Swedish treaty, of which that was said, used the phrase "any *citizens* of either of the two Contracting Parties dying without will or testament in the territory of the other Contracting Party" (212 N. Y. 221), precisely as the Persian treaty here involved uses the exactly equivalent phrase "citizen or subject of either of the contracting parties dying within the territories of the other" (I. 6). As, therefore, the Swedish treaty "ap-

plies equally to the estates of aliens who have their domicile in the United States," it follows that the Persian treaty also applies equally to the estates of aliens who have their domicile in the United States.

Rightly considered, therefore, the reasoning in the *D'Adamo case* sustains our contention and directly repudiates the view taken by the Surrogate. Indeed, it furnishes us with a direct statement by an able judge of an able court that nationality and not domicile is the test of the applicability of the treaty.

B.

Even if the treaty be susceptible to the construction placed upon it by the courts below, it certainly cannot be denied that it is *also susceptible to the construction contended for by the appellant;* and that being the case, the latter construction is the one to be adopted.

In *Asakura* v. *Seattle,* 265 U. S. 332, this court said (p. 342):

> "Treaties are to be construed in a broad and liberal spirit, and, when two constructions are possible, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred."

In *Nielsen* v. *Johnson,* 279 U. S. 47, this court again said (p. 52):

> "When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred."

In *Jordan* v. *Tashiro,* 278 U. S. 123, this court said (p. 127):

"The principles which should control the diplomatic relations of nations, and the good faith of treaties as well, require that their obligations should be liberally construed so as to effect the apparent intention of the parties to secure equality and reciprocity between them. See *Geofroy* v. *Riggs, supra; Tucker* v. *Alexandroff*, 183 U. S. 424, 437; *Wright* v. *Henkel*, 190 U. S. 40, 57; *In re Ross*, 140 U. S. 453, 475. Upon like ground, where a treaty fairly admits of two constructions, one restricting the rights that may be claimed under it and the other enlarging them, the more liberal construction is to be preferred. *Asakura* v. *Seattle*, 265 U. S. 332; *Tucker* v. *Alexandroff*, *supra; Geofroy* v. *Riggs, supra.*"

In each of those cases this court cited with approval *Geofroy* v. *Riggs*, 133 U. S. 258, in which this court had said (pp. 271, 272):

"It is a general principle of construction with respect to treaties that they shall be liberally construed, so as to carry out the apparent intention of the parties to secure equality and reciprocity between them. As they are contracts between independent nations, in their construction *words are to be taken in their ordinary meaning, as understood in the public law of nations*, and not in any artificial or special sense impressed upon them by local law, unless such restricted sense is clearly intended. And it has been held by this court that where a treaty admits of two constructions, one restrictive of rights that may be claimed under it and the other favorable to them, the latter is to be preferred. *Hauenstein* v. *Lynham*, 100 U. S. 483, 487."

The ordinary meaning of the words *citizen* and *subject* as understood in the public law of nations certainly is that they indicate *nationality* or *allegiance*, irrespective of domicile; and in construing the treaty here in question as re-

ferring only to foreign subjects *not domiciled in the United States* (R. 24) the courts below have not given to the words of the treaty "their ordinary meaning as understood in the public law of nations" and, also, have not given them that "liberal interpretation" which enlarges rather than restricts the rights claimed under them.

The Surrogate's opinion gives every indication of an attempt to construe the treaty in a manner which will make it harmonious with the law of New York. Indeed, it fairly may be said that he consciously strained and struggled to that end. But that is not consonant with the principles which this court has declared to be controlling in the interpretation of treaties. Thus, in *Nielsen* v. *Johnson*, 279 U. S. 47, this court said (pp. 51, 52):

> "The narrow and restricted interpretation of the Treaty contended for by respondent, while permissible and often necessary in construing two statutes of the same legislative body in order to give effect to both so far as is reasonably possible, is not consonant with the principles which are controlling in the interpretation of treaties. Treaties are to be liberally construed so as to effect the apparent intention of the parties. *Jordan* v. *Tashiro*, 278 U. S. 123; *Geofroy* v. *Riggs*, 133 U. S. 258, 271; *In re Ross*, 140 U. S. 453, 475; *Tucker* v. *Alexandroff*, 183 U. S. 424, 437. When a treaty provision fairly admits of two constructions, one restricting, the other enlarging, rights which may be claimed under it, the more liberal interpretation is to be preferred, *Asakura* v. *Seattle*, 265 U. S. 332; *Tucker* v. *Alexandroff*, *supra*; *Geofroy* v. *Riggs*, *supra*, and as the treaty-making power is independent of and superior to the legislative power of the states, the meaning of treaty provisions so construed is not restricted by any necessity of avoiding possible conflict with state legislation and when so ascertained must

prevail over inconsistent state enactments. See *Ware* v. *Hylton*, 3 Dall. 199; *Jordan* v. *Tashiro*, *supra*; cf. *Cheung Sum Shee* v. *Nagle*, 268 U. S. 336."

The treaties here in question, properly construed, are applicable to all subjects of a foreign nation dying within the United States, regardless of the domicile of such subject, and under the treaties as so construed the appellant was and is entitled to receive the estate here in question "so that he may dispose of (it) in accordance with the laws of his country".

POINT II.

The treaties constitute the supreme law of the land, and every state statute inconsistent therewith is invalid.

Although parts of the Surrogate's opinion indicate that his decision rests upon his *construction* of the treaties, there are other parts which afford strong evidence that his final conclusion was that if the treaties were inconsistent with the New York statutes then the treaties should yield to the statutes rather than that the statutes should yield to the treaties. That seems manifest from the fact that, after referring to the opinion in *Matter of D'Adamo*, 212 N. Y. 214, and saying that much of its reasoning applies to the present situation, he concluded (R. 24):

> "In this proceeding *the rights granted by the treaty* must be held to be *subordinate* to the succession statutes of our State."

The question in issue in *Matter of D'Adamo*, as already pointed out, was wholly different from the question

presented in the case at bar; but the opinion in that case expresses a doubt as to the power of the United States, by means of a treaty, to change the laws of a State with respect to the administration of the estates of those dying within its territorial limits (212 N. Y. 227, 228). The court pointedly refrained from expressing any opinion upon that subject, but its somewhat extended reference to what "distinguished secretaries of state" had said in disclaiming the existence of such a power in the Federal Government undoubtedly had its effect upon the mind of the Surrogate, and it must have been to that part of the opinion in the *D'Adamo case* that the Surrogate referred in saying that much of its reasoning "applies in the present situation" (R. 24).

It is to be remarked in passing that the statement of Mr. Fish, as quoted in that case, in reality *affirms* the right of the United States to make treaty stipulations inconsistent with the laws of the State relative to the administration and settlement of estates, for what Mr. Fish said was this (212 N. Y. 227):

> "The estates of decedents are administered upon and settled in the United States under the law of the state of which the decedent was a resident at the time of his death, and on this subject, *in the absence of any treaty regulations on the subject*, interference in the disposition of such measures as may be prescribed by the law of the particular state in such cases, is not within the province of the federal authorities."

But whatever doubt some Secretaries of State may have had, it is settled by decisions of this court that the treaty-making power of the United States *does* extend to the making of treaty stipulations which are inconsistent with the laws of the several states relating to the distribu-

tion of the property of aliens who die within their boundaries.

In *Hauenstein* v. *Lynham*, 100 U. S. 483, a treaty with Switzerland was held effectual to give to the plaintiffs-in-error land in Virginia which under the local law would have escheated to the State. The court there said:

> "That the laws of the State, irrespective of the treaty, would put the fund into her coffers, is no objection to the right or the remedy claimed by the plaintiffs-in-error" (p. 488).
>
> "A treaty stipulation may be effectual to protect the land of an alien from forfeiture by escheat under the laws of a State." (P. 489.)

In *Geofroy* v. *Riggs*, 133 U. S. 258, a treaty with France was held effectual to permit inheritance by aliens even though they would not have taken under the local law of the place where the property was situated. The court there said (p. 266):

> "That the treaty power of the United States extends to all proper subjects of negotiation between our government and the governments of other nations, is clear. It is also clear that the protection which should be afforded to the citizens of one country owning property in another, *and the manner in which that property may be transferred, devised or inherited*, are fitting subjects for such negotiation and of regulation by mutual stipulations between tne two countries."

In *Asakura* v. *Seattle*, 265 U. S. 332, a treaty with Japan was held effectual to secure to a Japanese a right to engage in the business of pawnbroker which was denied to him by an ordinance of Seattle.

In *Nielsen* v. *Johnson*, 279 U. S. 47, a treaty with Denmark was held effectual to prevent the imposition of an inheritance tax which was authorized by the law of the State of which the decedent, a citizen of Denmark, was a resident at the time of his death; and we again call attension to the fact that the court there stated that "the treaty-making power is *independent of and superior to the legislative power of the states*" and for that reason the meaning of treaty provisions "is not restricted by any necessity of avoiding possible conflict with state legislation" and when the meaning of a treaty is ascertained it "must prevail over inconsistent state enactments." (P. 52).

The treaty-making power of the United States thus clearly extends to the making of treaties which prescribe the manner in which the property of aliens resident in a State may be transferred, devised or inherited. And such treaties, by express provision of Section 2 of Article VI of the Constitution, are "the supreme law of the land" and "the judges in every State shall be bound thereby, anything in the constitution or laws of any State to the contrary notwithstanding."

POINT III.

The statutes of New York, in accordance with which the courts below directed payment of the estate, are inconsistent with the treaties and hence invalid.

There is no question, of course, but that the courts below followed and applied the New York statutes. The very words of the Surrogate's opinion are that the decree shall

provide for payment of the balance of the estate into the treasury of the City of New York "*pursuant to the statute of 1898* which regulates the duties of the Public Administrator in the disposition of the funds held by him" (R. 24). The Surrogate also stated that "ultimately the amount would find its way into the Treasury of the State of New York" (R. 22). His decree follows his opinion (R. 4, 5).

It is equally clear that the New York statutes which were so followed and applied are *inconsistent* with the treaties.

The statute of 1898 to which the Surrogate referred in his opinion is Chapter 230 of the Laws of New York of 1898, and subdivision 14 of Section 24 thereof provides that the balance of any money in the hands of the public administrator on the adjustment of his accounts "whether payable to persons unknown or if known whose places of residence are unknown, shall be paid immediately into the treasury of the city."* After remaining there for twenty years the fund is then paid to the Treasurer of the *State* of New York (*Matter of People* v. *Maltbie*, 102 N. Y. Misc. 575, affirmed 184 App. Div. 743, and 226 N. Y. 641, which construes Section 44 of the *State Finance Law* as applying to funds so deposited by the Public Administrator of New York County).

It is true that while the fund is in the possession of the treasury of the city, and also after it is paid to the Treasurer of the State, it is subject to being paid out to next of kin of the decedent if any appear; but if there be no next of kin the fund *becomes the property of the State of New York as by escheat*. That was the position taken by the Attorney General in *Matter of People* v. *Maltbie*, *supra* (102

*See Statement as to Jurisdiction, pp. 13, 14, for full quotation of the statute.

Misc. at p. 577) and is in accord with the law of New York as laid down in *Johnston* v. *Spicer*, 107 N. Y. 185, 196-201.*

By the statutes of New York, therefore, the fund is retained in New York and reverts to the State of New York. By the treaties, on the other hand, the appellant is entitled to have the fund immediately delivered to him "so that he may dispose of them in accordance with the laws of his country," *i. e.*, in accordance with the laws of Italy; and by the law of Italy the property reverts to Italy (R. 6).

The inconsistency between the statutes and the treaties is thus manifest. Under the former New York gets the property, whereas under the latter Italy gets it; and for the reasons and upon the authorities stated in Point II, *supra*, this inconsistency between the treaties and the statutes makes the statutes invalid.

POINT IV.

The courts below, in substance and effect, have denied the validity of the treaties.

Although the Surrogate's opinion proceeds, in part, upon the ground that the treaties are to be interpreted as limiting appellant's consular rights "to the receipt of the property of a national of Italy dying here but domiciled in that country" (R. 24), his final conclusion was that:

> "In this proceeding the *rights granted by the treaty* must be held to be *subordinate* to the succession statutes of our State." (R. 24.)

*In its original and technical sense, the term *escheat* was applicable only to real estate, but the doctrine is applied to personalty as well; and the personal estate of persons dying intestate without next of kin reverts to the State (*Johnson* v. *Spicer*, *supra*, and see 21 Corpus Juris 851 for a full discussion of the subject and the citation of numerous authorities. Compare, also, *American Loan and Trust Co.* v. *Grand Rivers Co.*, 159 Fed. 775).

The Surrogate thus *in terms* subordinated the treaties to the statutes, and thereby in effect denied the validity of the treaties.

But even if the last-quoted expression of the Surrogate be disregarded—even if there were no express assertion of the invalidity of the treaties—the fact nevertheless remains that the necessary effect of the decree is to deny the rights asserted under the treaties. It is not necessary, in order to constitute a decision against the validity of a treaty, that the ruling shall have been put in direct terms. If the necessary effect of the decree has been to deny the claim made under the treaty, that is enough. (See *Bryant* v. *Zimmerman*, 278 U. S. 63, 67.)

Conclusion.

The decree should be reversed with costs, and payment of the net estate to appellant should be directed.

Respectfully submitted,

CARROLL G. WALTER,
RALPH ATKINS,
Counsel for Appellant.

September, 1931.

Appendix.

(U. S. Rev. Stat. § 1709; U. S. Code, Title 22, § 75.)

§ 75. *Estates of decedents generally; General Accounting Office as conservator.*—It shall be the duty of consuls and vice-consuls, where the laws of the country permit—

First. To take possession of the personal estate left by any citizen of the United States, other than seamen belonging to any vessel, who shall die within their consulate, leaving there no legal representative, partner in trade, or trustee by him appointed to take care of his effects.

Second. To inventory the same with the assistance of two merchants of the United States, or, for want of them, of any others at their choice.

Third. To collect the debts due the deceased in the country where he died, and pay the debts due from his estate which he shall have there contracted.

Fourth. To sell at auction, after reasonable public notice, such part of the estate as shall be of perishable nature, and such further part, if any, as shall be necessary for the payment of his debts, and, at the expiration of one year from his decease, the residue.

Fifth. To transmit the balance of the estate to the Treasury of the United States, to be holden in trust for the legal claimant; except that if at any time before such transmission the legal representative of the deceased shall appear and demand his effects in their hands, they shall deliver them up, being paid their fees and shall cease their proceedings.

Sixth. The General Accounting Office shall act as conservator of such part of these estates as may be received

at the Treasury, and for its protection the Secretary of the Treasury may order such effects to be sold as may consist of jewelry or other articles which have heretofore or may hereafter be received at the Treasury, and pay the expenses of such sale out of the proceeds, provided application for these effects shall not have been made by the legal claimant within two years after their receipt. The General Accounting Office is authorized to indorse all bills of exchange, promissory notes, and other evidences of indebtedness due to such estates, and to take such steps as may be necessary for their collection. The proceeds of such sales, together with such other moneys as may be collected by it, shall be deposited into the Treasury in trust for the legal claimant, and be reported to the Secretary of State. (R. S. § 1709; Mar. 3, 1911, c. 223, 36 Stat. 1083; June 10, 1921, c. 18, § 304, 42 Stat. 24.)

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CHARLES ELMORE CRO
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Supreme Court of the United States

OCTOBER TERM, 1931

No. 31

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of ANTONIO COMINCIO, Deceased, and JOHN J. BENNETT, JR., Attorney General of the State of New York,

Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

CARROLL G. WALTER,
RALPH ATKINS,
Of Counsel for Appellant.

Supreme Court of the United States

OCTOBER TERM, 1931

No. 31

MAGNO SANTOVINCENZO, Consul of the Kingdom of Italy at New York,

Appellant,

against

JAMES F. EGAN, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of ANTONIO COMINCIO, Deceased, and JOHN J. BENNETT, JR., Attorney General of the State of New York,

Appellees.

APPEAL FROM SURROGATES' COURT, COUNTY OF NEW YORK, STATE OF NEW YORK

APPELLANT'S REPLY BRIEF

I

We have not undertaken to ask this court to review the *finding of fact* that decedent was *domiciled* in New York. The whole of Point I in the Attorney General's brief thus may be disregarded.

II

With respect to the treaty, appellee does not deny that it is susceptible to the construction for which we contend.

Neither is there any denial that the settled rule is that, when two constructions of a treaty are possible, the one which enlarges, rather than restricts, the rights claimed under it is to be preferred (Our Brief, pp. 13, 14). Nevertheless, appellee argues that our interpretation *should* not be adopted because it "would involve strange consequences" (Appellee's Brief, pp. 9, 11). The "strange consequences" instanced would not, however, ensue.

Appellee argues, for example, that it is incredible that the treaty "would operate to prevent a Persian alien, after establishing here a prosperous business, from making such testamentary disposition of his property as our law approves, merely because he lacked a family or business partners" (p. 9). We do not contend that the treaty would so operate. We think it manifest, on the contrary, that the treaty applies *only* to *intestate* estates and does not prevent the nationals of either country from making a will.

Appellee further suggests, though he does not directly assert, that under our construction of the treaty the property of Italian nationals dying here would not be subject to the decedent's debts (p. 11). We make no such pretension. Comincio's estate has been regularly applied, to the extent necessary, to the payment of administration expenses (R. 11), and the only reason it has not been applied to debts is that there are no debts (R. 11). It is only the *net* estate, remaining after administration expenses and debts are paid, which the Italian government claims.

The single case relied upon by the appellee is *Matter of D'Adamo*, 212 N. Y. 214, in which, of course, the question was quite different, *viz.*, the right of foreign consuls to *administer* the estates of their nationals, as distinguished from the right of the sovereign of which the decedent is a national to receive property to which there

is no claimant other than the sovereignty in which he was domiciled. "Strange consequences" would have followed a result different from that which was reached in *Matter of D'Adamo,* but no strange consequences would follow an adoption of our contention here.

Indeed, at page 10 of the appellee's brief we find this flat admission:

> "The conclusion is irresistible that the Persian treaty was designed to apply, and must be so construed as applying, only to *derelict estates,* as such."

With that statement we thoroughly agree. Comincio's estate *is* a derelict estate. It escheats either to New York or to Italy. The only question is: To which sovereign does it escheat?

Finally, although appellee relies upon *Matter of D'Adamo,* there is in the opinion in that case a direct statement that the treaty "applies equally to the estates of aliens who have their domicile in the United States." (See p. 12 of Our Brief, and p. 10 of Appellee's Brief.) That statement is in itself a refutation of the whole of appellee's argument.

Respectfully submitted,

CARROLL G. WALTER,
RALPH ATKINS,
Of Counsel for Appellant.

October, 1931.

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CHARLES ELMORE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 31—File No. 35709.

Magno Santovincenzo, Consul of the Kingdom of Italy at New York,

Appellant,

vs.

James F. Egan, Public Administrator of the County of New York, as Administrator of the Goods, Chattels and Credits of Antonio Comincio, deceased, and John J. Bennett, Jr., Attorney General of the State of New York,

Appellees.

BRIEF OF APPELLEE, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK.

John J. Bennett, Jr.,
Attorney General of the State of New York,
Appellee.

Robert P. Beyer,
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Counsel for Appellee.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1931.

No. 31—File No. 35709.

In the Matter
of
The Judicial Settlement of the Account of Proceedings of the Public Administrator of the County of New York, Administrator of the Goods, Chattels and Credits of Antonio Comincio, deceased.

Magno Santovincenzo, Acting Consul General of Italy at New York,

Appellant,

James F. Egan, Public Administrator of the County of New York, as Administrator of the Estate of Antonio Comincio, deceased, and John J. Bennett, Jr., Attorney General of the State of New York,

Appellees.

BRIEF FOR APPELLEES, THE ATTORNEY GENERAL OF THE STATE OF NEW YORK.

Statement of Facts.

This is an appeal from a decree of the Surrogate's Court of the County of New York entered July 3rd, 1929, on the judicial settlement of the account of James F. Egan, the Public Administrator of the County of New York, as

Administrator of the Estate of Antonio Comincio, deceased, directing that the net assets remaining for distribution be paid into the treasury of the City of New York, for the benefit of the unknown next of kin of said decedent.

Antonio Comincio, the decedent, was born in Italy (fol. 73) of unknown parents (page 18). He came to New York about the year 1890 (page 18), and with the exception of one visit to Italy about the year 1898, when he stayed away for several months (pages 19, 20), he continued to reside at No. 365 East 76th street, in the City of New York, down to the time of his death, on January 5, 1929, having lived in the same house for more than twenty-five years (page 21). Decedent about 1924 said, "I have no one in Italy, why should I go to Italy?", but said he would retire and return back to Italy if his friend Speranzo would go with him (page 21). But Speranzo said he did not want to go back and decedent said, "You won't go, neither will I." (page 22).

The Consul General of Italy at New York, in his official capacity, made claim to the net assets in the estate, upon two grounds: first, that the decedent's domicile of origin had not been changed at the time of his death, and that the Law of the Kingdom of Italy, should, therefore, apply in the distribution of the estate; and second, that said Consul General of Italy is entitled to receive the said assets by virtue of the provisions of treaties between the United States and the Kingdom of Italy, and the United States and the Kingdom of Persia (answer, page 6).

The Surrogate, below, overruled both contentions and decreed that the balance of the estate be paid into the Treasury of the City of New York for the benefit of unknown next of kin (page 3).

An Appeal was taken by the Italian Consul from the decree judicially settling the account of the Public Admin-

istrator of New York County to the Appellate Division of the New York Supreme Court, First Judicial Department, which said court affirmed said decree (page 26). Thereafter said consul made application for leave to appeal further to the Court of Appeals of the State of New York, which said court denied said application and refused to review the case (page 28). Thereupon said counsel appealed to this court, praying for reversal and contending that the statutes of the State of New York providing for the disposition of the decedent's estate as made by the Surrogate were in contravention of the treaties of the United States affecting the Kingdom of Italy (page 33).

POINT I.

The domicile of this decedent was in the State of New York.

The decedent was an illegitimate child; he had no blood relations; no kith or kin, and he was never married. He came to New York in or about the year 1890 and engaged in the business of vegetable peddling, which pursuit he followed to the time of his death. The decedent resided continuously in New York City for this period of thirty-five (35) years, excepting for several months in 1898 which he spent on a visit to his native country. At the time of his death he lived at No. 365 East 76th street, Manhattan, which had been his home continuously for over twenty-five (25) years. Under these circumstances, it is evident that the deceased made his home in his adopted country for the entire thirty-five (35) years that elapsed since he left his native Italy. That he regarded New York as his home is evidenced by the conversation with his friend Speranzo:

"Q. Did he ever tell you that America was his country now? A. He said: 'I have no one in Italy; why should I go to Italy?' However, he expressed an intention to go to Italy if I would go with him, but I had my family here and we did not go.

Q. When he wanted to go to Italy it was merely for a visit? A. He said: 'I have $2,000; I wanted to retire and return back to Italy if you will come with me.'

Q. Only for a visit? A. Sure, to retire.

By the Surrogate:

Q. You did not want to go back? A. I have my family here. I did not want to go.

Q. Did you tell him that? A. Yes.

Q. What did Comincio say? A. He said: 'You won't go, neither will I.'

Q. When was that? A. About five years ago."

When is a domicil of origin changed to one of choice? In the famous case involving the domiciliatory status of General Kosciusko, this Court answered this question in an opinion which has been universally followed. The Court there (Ennis v. Smith, 55 U. S. 399, at page 422) says:

"But what amount of proof is necessary to change a domicil of origin into a *prima facie* domicil of choice? It is residence elsewhere, or where a person lives out of the domicil of origin. That repels the presumption of its continuance, and casts upon him who denies the domicil of choice the burden of disproving it. Where a person lives is taken *prima facie* to be his domicil, until other facts establish the contrary. It is difficult to lay down any rule under which every instance of residence could be brought, which may make a domicil of choice. But there must be to constitute it, actual residence in the place, with the intent that it is to be a principal and permanent residence. That intent may be inferred from the circumstances or conditions in which a person may be as to the domicil of his origin, or from

the seat of his fortune, his family and pursuits of life. A removal which does not contemplate an absence from the former domicil for an indefinite and uncertain time is not a change of it. But when there is a removal, unless it can be shown, or inferred from circumstances, that it was for some particular purpose, expected to be only of a temporary nature, or in the exercise of some particular profession, office or calling, it does change the domicil. The result is that the place of residence is *prima facie* the domicil, unless there be some motive for the residence not inconsistent with a clearly established intent to retain a permanent residence in another place."

"Domicile" was defined by this Court in Mitchell vs. United States, 88 U. S. 350, 352, as follows:

"A residence at a particular place accompanied with positive or presumptive proof of an intention to remain there for an unlimited time. This definition is approved by Phillmore in his work on the subject. By the term *domicile*, in its ordinary acceptation, is meant the place where a person lives and has his home. The place where a person lives is taken as his domicile unless facts adduced establish the contrary."

In Williamson vs. Osenton, 232 U. S. 619, this Court stated:

"The very meaning of domicile is the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined."

In Matter of Newcomb, 192 N. Y. 238, at page 250, the Court said:

"The question is one of fact rather than law, and it frequently depends upon a variety of circumstances, which differ as widely as the peculiarities of individuals."

Professor Moore, in his Digest of International Law, defines one's domicile as his "permanent home," and cites with approval from Guier v. O'Daniel, 1 Binney, 349, that

> "Domicil is defined as a residence at a particular place, accompanied with positive or presumptive proof of continuing it an unlimited time."

Likewise, in a famous case, the Supreme Court of Massachusetts in (McConnell v. Kelley, 138 Mass. 372) said:

> "In determining whether there has been such a change from one place to another, the test is to inquire whether he has in fact removed his home to the latter place with the intention of making it his residence permanently, or for an indefinite time. If he has, he loses his old domicil, and acquires a new one with all its rights and incidents."

In The Venus, 12 U. S. 253, 279, this Court speaking on this subject, said:

> "A person who removes to a foreign country, settles there, and engages in the trade of the country, furnishes by these acts such evidence of an intent permanently to reside there as to stamp him with the national character of the state where he resides."

That the decedent remained an Italian subject, failing to complete citizenship here (fol. 93), is immaterial.

In re: Mesa v. Hernandez, 87 N. Y. Misc. 242, at page 252, we read:

> "Citizenship and nationality and domicile involve different principles. A citizen of any country may retain his citizenship in that country and yet have his last domicile out of that country."

Professor Moore expresses the idea in his Digest of International Law (Vol. 3 at page 811) thus:

> "By the person's domicil is meant, generally speaking, his permanent home. It is the criterion in English and American Law of civil as distinguished from political status. The case is the same in the law of other countries, though not of all. In Italy, for example, civil status follows the political."

Appellant's reliance on Dupuy v. Wurtz, 53 N. Y. 556, does not aid him. There, it appeared clearly from the decedent's repeated expressions on the subject, that she in fact had no desire or intention to change her domicil but continuously expressed her love for the United States and planned to return to her native country, until the condition of her health made this impossible. The distinction between the facts of that case and those of the instant case is so marked as to call for no further comment.

The record at bar amply sustains the conclusion of the learned surrogate that this decedent's "intention to abandon his domicile of origin and to establish and maintain a domicile in this country is clearly established by the evidence" (fol. 34, page 23).

POINT II.

The established rule that succession to personalty follows the law of the domicile is not affected by the Persian treaty.

That the distribution of a decedent's estate is governed by the law of his domicile is so well settled, as appellant's counsel concedes, as "to require no citation of authorities." The courts of all states have unfailingly given their ap-

proval to the famous pronouncement of this Court, in Ennis v. Smith, *supra* (55 U. S., at page 424):

> "For several hundred years upon the continent, and in England, from reported cases, for a hundred years, the rule has been that personal property in case of intestacy is to be distributed by the law of the domicile of the intestate at the time of his death. It has been universal for so long a time that it may now be said to be a part of the '*jus gentium.*'"

Appellant here claims that this doctrine, so universally recognized in our jurisprudence, must be deemed to have been abandoned in favor of Persian subjects, because of the provisions of the Persian treaty of 1857, and in favor of the nationals of all other countries, including Italy, whose treaties with us contain the "most favored nation" clause. Appellant insists that the Persian treaty, never before invoked by any foreign power possessing "most favored nation" rights, must "prevail" over this basic tenet of our substantive law. And appellant here demands that the personalty of this decedent pass, not to the New York City Treasury, pending ascertainment of the persons entitled thereto, as the New York law requires, but to the Italian Consul for disposition, to-wit: State confiscation, pursuant to Italian procedure.

Whether the treaty-making power may constitutionally be so exercised as to supplant, or even qualify the commonwealth laws regulating the administration of estates was left open to question by the New York Court of Appeals in Matter of D'Adamo (212 N. Y. 214), although the court cites, and without disapproval, the opinions of various Secretaries of State disclaiming the existence of such a power (212 N. Y. at pages 227-228). Nor is that question here involved. The construction of the Persian statute, here sought, is so subversive of our settled law, that:

"It is not to be lightly presumed that the government of the nation departed from the precedents of a century, and by an obscure clause in a long and involved article of this convention, overturned its settled practice" (212 N. Y. at page 228).

The treaty, under consideration at bar, so far as is here pertinent, provides (in language whose obscure meaning will be hereinafter considered) that upon the death in the United States of a Persian national "his effects shall be delivered up *integrally* to the family or partners in business of the deceased"; lacking such, the effects shall be delivered to the Persian Consul, "so that he may dispose of them in accordance with the laws of his country."

Appellant here contends that this convention must be deemed to apply to all Persian nationals, whether or not domiciled in the United States at the time of their death. Such interpretation would involve strange consequences. It is incredible that the treaty would operate to prevent a Persian alien, after establishing here a prosperous business, from making such testamentary disposition of his property as our law approves, merely because he lacked a family or business partners. Similar comment was made in the D'Adamo case, where the court had under consideration the Swedish treaty which was claimed by the Italian Consul as entitling him to priority in the administration of the effects of Italian nationals dying here, superior to that granted by our law. Judge Cardozo, in pointing out the absurdity of the Italian contention on this point, observed (212 N. Y. at page 226):

"If the convention means more than this, if it was intended to confer upon foreign consuls an exclusive and paramount right, strange consequences must follow. It is not restricted in its operation to the estates

of aliens who have died in the United States while temporarily sojourning here but who have retained a domicile in their native lands. It applies equally to the estates of aliens who have their domicile in the United States. If an alien, settling in New York, were to build up a business, and, marrying, rear a family among us, the respondent would have us hold that his children, citizens of this state, would have to yield the right of administration to a foreign consul. In that view, the consul is not only eligible as administrator, but eligible to the exclusion of every one else, even the closest relatives of the dead man, and that too, though the entire estate is located here, and is here to be distributed. We are unwilling to believe that such results were contemplated in concluding the convention. We hold it to be incredible that there has been attached to the consular office a right that exceeds so greatly the occasion and the needs of the consular function. Before adopting a construction that will bring these consequences to pass, we have a right to expect a far plainer manifestation of the will of the national government than any that has been afforded by the language now before us. The construction that we thus hold to be the true one finds additional confirmation when we consider the respective fields of state and national legislation, and the refusal of the federal government, as disclosed in our diplomatic history, to trench upon the rights of the states to administer the estates of those dying within their territorial limits."

The conclusion is irresistible that the Persian treaty was designed to apply, and must be so construed as applying, only to *derelict estates*, as such. The reasoning of the D'Adamo case applies here again with surprising aptness:

"This construction is confirmed when we consider that it harmonizes the functions of consuls under the treaty with the functions of consuls under established international practice * * *. The function of consuls

is to preserve derelict estates. When their countrymen die in foreign lands, it is their duty to step in and guard the stranded property from waste" (212 N. Y. at page 223).

Further confirmation of this as the only reasonable construction of the Persian treaty is found in its very wording. The notion that one's effects shall be *delivered up integrally* to his "family or partners in business" is repugnant to the basic requirement of all modern law that a decedent's property be first answerable for his debts and then distributed to his donees, subject only to such restrictions as the law of the domicile imposes. To hold that the treaty applies solely to Persian nationals *temporarily sojourning here*, as the learned surrogate below has found, not alone reconciles the convention to well settled law, but gives it a rational, if not the sole credible interpretation.

In this view of the understanding of the treaty at bar, it is not deemed necessary to comment on appellant's insistence that he is entitled to all its benefits, perforce of the "most favored nation" clause of the Italian treaty. It must be presumed that the subject was under consideration, in 1894, when our government declined to authorize Italian Consuls to settle the estates of their deceased nationals in this country. (See 212 N. Y. at page 228.)

Such conclusion accords with the decision in Rocco vs. Thompson, 223 U. S. 317, wherein this Court affirmed a California decision (157 Cal. 552) denying administration of an Italian subject's estate to the Consul General of Italy and awarding administration to the public administrator in accordance with the state law. As the Court, in its opinion, noted that in this country the right to administer property left by a foreigner within the jurisdiction of the state is primarily committed to state law. This Court concluded its opinion as follows:

"Our conclusion then, is that, if it should be conceded for this purpose that the most-favored nation clause in the Italian treaty carries the provisions of the Argentine treaty to the consuls of the Italian government in the respect contended for (a question unnecessary to decide in this case), yet there was no purpose in the Argentine treaty to take away from the states the right of local administration provided by their laws, upon the estates of decedents of a foreign country, and to commit the same to the consuls of such foreign nation, to the exclusion of those entitled to administer as provided by the local laws of the state within which such foreigner resides and leave property at the time of decease."

Administration by the public administrator in the instant case is expressly provided for and regulated by Chapter 230 of the Laws of 1898. (State of New York.) Section 14 of said statute provides for the payment of the residue of the estate, as to whom the rightful owner is unknown, into the City Treasury for the benefit of the person or persons who may thereafter be proven to be entitled thereto. This depositary is peculiar to the public administrators of New York and Bronx Counties. In other instances of unknown owners, similar deposits are directed to be made into the State treasury. (Section 272 New York Surrogate's Court Act, Laws 1914, chapter 443.) The state has therefore declared a settled policy that all personal property of persons domiciled within its borders is to remain in the state, unless directed to be paid to those next of kin who are proven to be actually entitled thereto. This right of local administration by the State of New York will be upheld by this Court, and no presumption destructive of state sovereignty will be indulged in.

POINT III.

The decree appealed from should be in all respects affirmed with costs.

Respectfully submitted,

JOHN J. BENNETT, JR.,
Attorney General of the State of New York.

ROBERT P. BEYER,
Deputy Assistant Attorney General,
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 31.—October Term, 1931.

Magno Santovincenzo, Consul of the Kingdom of Italy at New York, Appellant,
vs.
James F. Egan, Public Administrator, etc., and John J. Bennett, Jr., Attorney General of the State of New York.

Appeal from the Surrogates' Court of the County of New York, State of New York.

[November 23, 1931.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Antonio Comincio, a native of Italy, died intestate in New York City sometime prior to March 10, 1925, when letters of administration were issued to the respondent as Public Administrator by the Surrogates' Court of New York County. Upon the judicial settlement of the administrator's account, the appellant, the Consul General of Italy at New York, presented the claim that the decedent at the time of his death was a subject of the King of Italy and had left no heirs or next of kin, and that, under Article XVII of the Consular Convention of 1878 between the United States and Italy, the petitioner was entitled to receive the net assets of the estate for distribution to the Kingdom of Italy. The Attorney General of New York contested the claim. The Surrogates' Court, finding that the domicile of the decedent was in New York City, decreed that the balance of the estate, amounting to $914.64, after payment of debts and the sums allowed as commissions and as expenses of administration, be paid into the treasury of New York City for the use and benefit of the unknown kin of the decedent. The decree was affirmed by the Appellate Division of the Supreme Court of the State, First Department, and both the Appellate Division and the Court of Appeals of the State denied leave to appeal to the latter court. The

case may be regarded as properly here on certiorari. Jud. Code, sec. 237 (c); U. S. C., Tit. 28, sec. 344 (c).

There is no controversy as to the facts. The decedent was never naturalized, and at the time of his death was an Italian subject. He had lived in New York for many years, and the finding that the decedent was domiciled there is not open to question. Nor were any heirs or next of kin discovered. The testimony introduced on behalf of the Italian Consul General, which was undisputed, stated that the decedent had no relatives, and the decree of the Surrogates' Court recited that next of kin were unknown. The decree was made pursuant to chapter 230 of the Laws of New York of 1898. The Surrogate said in his opinion: "Pursuant to our statutes this amount would be directed in the decree to be paid into the city treasury of the City of New York to await ascertainment of the next of kin. Ultimately the amount would find its way into the treasury of the State of New York".

The provision of the Consular Convention between the United States and Italy, under which the claim of the Italian Consul General was made, provides (20 Stat. 725, 732):

"Article XVII. The respective Consuls General, Consuls, Vice-Consuls and Consular Agents, as likewise the Consular Chancellors, Secretaries, Clerks or Attachés, shall enjoy in both countries, all the rights, prerogatives, immunities and privileges which are or may hereafter be granted to the officers of the same grade, of the most favoured nation."

Pursuant to this agreement, the Italian Consul General sought the application of Article VI of the Treaty between the United States and Persia of 1856 as follows (11 Stat. 709, 710):

"Article VI. In case of a citizen or subject of either of the contracting parties dying within the territories of the other, his effects shall be delivered up integrally to the family or partners in business of the deceased; and in case he has no relations or partners, his effects in either country shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country."

This Treaty with Persia was terminated on May 10, 1928, but, as this was subsequent to the death of the Italian national whose estate is in question, the termination does not affect the present case.

It may be assumed that Article XVII of the Consular Convention with Italy contemplates reciprocity with respect to the rights and privileges sought, and there is no suggestion that Italy has not recognized the right of consuls of the United States to take the effects of the citizens of the United States dying in Italy in circumstances similar to those in which the present claim of the Italian Consul General is pressed. As, in this view, there appears to be no ground for denying the right of the Italian Consul General to demand the application of the last clause of Article VI of the Treaty with Persia, the only question is as to the interpretation of that provision.

We are not here concerned with questions of mere administration, nor is it necessary to determine that the loose phrasing of the provisions of Article VI precludes an appropriate local administration to protect the rights of creditors. Nor have we to deal with a case of testamentary disposition. In this instance there is no will, administration has been had, creditors have been paid, proper steps have been taken, without success, to discover kin of the decedent, and, assuming the absence of relatives, the question is one of escheat, that is, whether the net assets shall go to Italy or to the State of New York. The provision of Article VI of the Treaty with Persia does not contain the qualifying words "conformably with the laws of the country" (where the death occurred) as in the case of the Treaty between the United States and the Argentine Confederation of 1853 (Art. IX, 10 Stat. 1001, 1009; *Rocca* v. *Thompson,* 223 U. S. 317, 326, 330, 332); or the phrase "so far as the laws of each country will permit", as in the Consular Convention between the United States and Sweden of 1910 (Art. XIV, 37 Stat. 1479, 1487, 1488; *Rocca* v. *Thompson, supra; Matter of D'Adamo,* 212 N. Y. 214, 222, 223). The omission from Article VI of the Treaty with Persia of a clause of this sort, so frequently found in treaties of this class, must be regarded as deliberate. In the circumstances shown, it is plain that effect must be given to the requirement that the property of the decedent "shall be delivered up to the consul or agent of the nation of which the deceased was a subject or citizen, so that he may dispose of them in accordance with the laws of his country", unless a different rule is to apply simply because the decedent was domiciled in the United States.

The language of the provision suggests no such distinction and, if it is to be maintained, it must be the result of construction based upon the supposed intention of the parties to establish an exception of which their words give no hint. In order to determine whether such a construction is admissible, regard should be had to the purpose of the Treaty and to the context of the provision in question. The Treaty belongs to a class of commercial treaties the chief purpose of which is to promote intercourse, which is facilitated by residence. Those citizens or subjects of one party who are permitted under the Treaty to reside in the territory of the other party are to enjoy, while they are such residents, certain stipulated rights and privileges. Whether there is domiciliary intent, or domicile is acquired in fact, is not made the test of the enjoyment of these rights and privileges. The words "citizens" and "subjects" are used in several articles of the Treaty with Persia and in no instance are they qualified by a distinction between residence and domicile. Thus, in Article III we find the following provision (11 Stat. 709):

"Article III. The citizens and subjects of the two high contracting parties, travellers, merchants, manufacturers, and others, who may reside in the territory of either country, shall be respected and efficiently protected by the authorities of the country and their agents, and treated in all respects as the subjects and citizens of the most favored nation are treated."

It would be wholly inadmissible to conclude that it was the intention that citizens of the United States, making their residence in Persia under this Treaty, would be denied the benefit of Article III in case they acquired a domicile in Persia. The provision contemplated residence, nothing is said to indicate that domicile is excluded, and the clear import of the provision is that, so long as they retained their status as citizens of the United States, they would be entitled to the guaranty of Article III. The same would be true of Persians permitted to reside here under the Treaty.

Again, the provisions of Article V of the Treaty were of special importance, as they provided for extraterritorial jurisdiction of the United States in relation to the adjudication of disputes.[1]

[1] "Article V. All suits and disputes arising in Persia between Persian subjects and citizens of the United States, shall be carried before the Persian tribunal to which such matters are usually referred at the place where a consul or agent of the United States may reside, and shall be discussed, and

It would thwart the major purpose of the Treaty to exclude from the important protection of these provisions citizens of the United States who might be domiciled in Persia. The test of the application of every paragraph of Article V, with respect both to citizens of the United States and to Persian subjects, clearly appears to be that of nationality, irrespective of the acquisition of a domicile as distinguished from residence.

We find no warrant for a more restricted interpretation of the words "a citizen or subject of either of the contracting parties" in Article VI than that which must be given to the similar description of persons throughout the other articles of the Treaty. The same intention which made nationality, without limitation with respect to domicile, the criterion in the other provisions, dominates this provision. The provision of Article VI is reciprocal. The property of a Persian subject dying within the United States, leaving no kin, is to be dealt with in the same manner as the property of a citizen of the United States dying in Persia in similar circumstances.

It is not necessary to invoke the familiar rule with respect to the liberal construction of treaties,[2] as the instant case merely calls

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decided according to equity in the presence of an employé of the consul or agent of the United States.

"All suits and disputes which may arise in the empire of Persia between citizens of the United States, shall be referred entirely for trial and for adjudication to the consul or agent of the United States residing in the province wherein such suits and disputes may have arisen, or in the province nearest to it, who shall decide them according to the laws of the United States.

"All suits and disputes occurring in Persia between the citizens of the United States and the subjects of other foreign Powers, shall be tried and adjudicated by the intermediation of their respective consuls or agents.

"In the United States, Persian subjects, in all disputes arising between themselves, or between them and citizens of the United States or foreigners, shall be judged according to the rules adopted in the United States respecting the subjects of the most favored nation.

"Persian subjects residing in the United States, and citizens of the United States, residing in Persia, shall, when charged with criminal offences, be tried and judged in Persia and the United States in the same manner as are the subjects and citizens of the most favored nation residing in either of the above-mentioned countries."

[2]Hauenstein *v.* Lynham, 100 U. S. 483, 487; Geofroy *v.* Riggs, 133 U. S. 258, 271; Tucker *v.* Alexandroff, 183 U. S. 424, 437; Asakura *v.* Seattle, 265 U. S. 332, 342; Jordan *v.* Tashiro, 278 U. S. 123, 127; Nielsen *v.* Johnson, 279 U. S. 47, 52.

for a reading of the provision as to "citizens" and "subjects" according to its terms. There is no applicable principle which permits us to narrow them. As treaties are contracts between independent nations, their words are to be taken in their ordinary meaning 'as understood in the public law of nations'. *Geofroy v. Riggs*, 133 U. S. 258, 271.

There can be no question as to the power of the Government of the United States to make the treaty with Persia or the Consular Convention with Italy. The treaty-making power is broad enough to cover all subjects that properly pertain to our foreign relations, and agreement with respect to the rights and privileges of citizens of the United States in foreign countries, and of the nationals of such countries within the United States, and the disposition of the property of aliens dying within the territory of the respective parties, is within the scope of that power, and any conflicting law of the State must yield. *Hauenstein* v. *Lynham*, 100 U. S. 483, 489; *Geofroy* v. *Riggs, supra*, at p. 266; *Missouri* v. *Holland*, 252 U. S. 416, 434; *Sullivan* v. *Kidd*, 254 U. S. 433, 440; *Asakura* v. *Seattle*, 265 U. S. 332, 343; *Todok* v. *Union State Bank*, 281 U. S. 449, 453.

Our conclusion is that, by virtue of the most-favored-nation clause of Article XVII of the Consular Convention between the United States and Italy of 1878, the Italian Consul General was entitled in the instant case, being that of the death of an Italian national in this country prior to the termination of the Treaty between the United States and Persia of 1856, to the benefit of Article VI of that Treaty, and that the net assets of the decedent should be delivered to him accordingly.

The decree is reversed, and the cause is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.